| No. 16-1519 | |
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| Title: | **Sergio Fernando Lagos, Petitioner**<br>**v.**<br>**United States** |
| Docketed: | June 21, 2017 |
| Lower Ct: | United States Court of Appeals for the Fifth Circuit |
| Case Numbers: | (16-20146) |
| Decision Date: | March 17, 2017 |
| **Questions Presented** | |

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| Jul 12 2017 | Order extending time to file response to petition to and including August 21, 2017. |
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| Dec 08 2017 | Waiver of the 14-day waiting period under Rule 15.5 filed by petitioner Sergio F.Lagos.<br>**Main Document** |
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| Jan 12 2018 | Petition GRANTED. |
| Feb 09 2018 | Blanket Consent filed by Petitioner, Sergio F.Lagos.<br>**Blanket Consent** |
| Feb 23 2018 | SET FOR ARGUMENT on Wednesday, April 18, 2018. |
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| Feb 26 2018 | Brief of petitioner Sergio F.Lagos filed.<br>**Main Document** **Certificate of Word Count** **Proof of Service** |
| Mar 05 2018 | Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)<br>**Main Document** **Certificate of Word Count** **Proof of Service** |
| Mar 05 2018 | Brief amicus curiae of Professor Shon Hopwood filed. (Distributed)<br>**Main Document** **Certificate of Word Count** **Proof of Service** |
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RECORD AND BRIEFS

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# In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Under the Mandatory Victims Restitution Act (MVRA), courts must order the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4).

In the decision below, the Fifth Circuit, adopting the decisions of multiple courts of appeals, held that this provision covers the costs of internal investigations and private expenses that were "neither required nor requested" by the government; these private costs were incurred *outside* the government's official investigation, and, indeed, were incurred *before* the government's investigation even began. In reaching this conclusion, the Fifth Circuit expressly rejected the "opposite conclusion" from the D.C. Circuit, which itself "recognize[d]" but "respectfully disagree[d]" with the decisions of four other courts of appeals. Judge Higginson concurred below, acknowledging that he was bound by circuit precedent, but "agree[d] with the D.C. Circuit's persuasive interpretation" of the statute.

The courts of appeals are clearly and intractably divided over this important and recurring question of statutory interpretation—one that repeatedly occurs whenever companies detect hints of fraud and conduct an internal investigation.

The question presented is:

Whether Section 3663A(b)(4) covers costs that were "neither required nor requested" by the government, including costs incurred for the victim's own purposes and unprompted by any official government action.

## TABLE OF CONTENTS

Page

Opinions below ..... 1
Jurisdiction ..... 1
Statutory provisions involved ..... 2
Introduction ..... 2
Statement ..... 3
Reasons for granting the petition ..... 9
A. There is a widely acknowledged and intractable circuit conflict over the scope of 18 U.S.C. 3663A(b)(4) ..... 10
B. The proper construction of Section 3663A(b)(4) is a recurring question of great importance ..... 23
C. This case is an optimal vehicle for deciding the question presented ..... 26
D. The decision below is incorrect ..... 27
Conclusion ..... 29
Appendix A — Court of appeals opinion (Mar. 23, 2017) ..... 1a
Appendix B — Distict court judgment (Feb. 18, 2016) ..... 12a
Appendix C — Trial transcript (Feb. 8, 2016) ..... 28a
Appendix D — Court of appeals judgment (Mar. 17, 2017) ..... 40a
Appendix E — Statutory provision ..... 41a

## TABLE OF AUTHORITIES

Cases:

*Honeycutt* v. *United States*, No. 16-142 (U.S. June 5, 2017) ..... 25
*Kimbrough* v. *United States*, 552 U.S. 85 (2007) ..... 24
*Kucana* v. *Holder*, 558 U.S. 233 (2010) ..... 13
*Lafler* v. *Cooper*, 566 U.S. 156 (2012) ..... 24
*Lockhart* v. *United States*, 136 S. Ct. 958 (2016) ..... 25
*Padilla* v. *Kentucky*, 559 U.S. 356 (2010) ..... 24

Page

Cases—continued:

*Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998) ..... 12
*Reves* v. *Ernst & Young*, 507 U.S. 170 (1993) ..... 11
*United States* v. *Adcock*, 534 F.3d 635 (7th Cir. 2008) .... 16
*United States* v. *Amato*, 540 F.3d 153 (2d Cir. 2008) ..... *passim*
*United States* v. *Bahel*, 662 F.3d 610 (2d Cir. 2011) ..... 16, 24
*United States* v. *Carpenter*, 841 F.3d 1057 (8th Cir. 2016) ..... 21
*United States* v. *Cummings*, 281 F.3d 1046 (9th Cir. 2002) ..... 28
*United States* v. *Cuti*, 778 F.3d 83 (2d Cir. 2014) ..... 20
*United States* v. *DeRosier*, 501 F.3d 888 (8th Cir. 2007) ..... 16, 21
*United States* v. *Dwyer*, 275 F. App'x 269 (5th Cir. 2008) ..... 7, 17
*United States* v. *Elson*, 577 F.3d 713 (6th Cir. 2009) ..... 10, 15, 17
*United States* v. *Eyraud*, 809 F.3d 462 (9th Cir. 2015) ..... 16, 18, 22, 28
*United States* v. *Gordon*, 393 F.3d 1044 (9th Cir. 2004) ..... 14, 21
*United States* v. *Greany*, No. 14-10061-RWZ, 2014 WL 4205385 (D. Mass. Aug. 25, 2014) ..... 17
*United States* v. *Gupta*, 925 F. Supp. 2d 581 (S.D.N.Y. 2013) ..... 17
*United States* v. *Henrie*, 177 F. App'x 677 (9th Cir. 2006) ..... 16
*United States* v. *Herrera*, 606 F. App'x 748 (5th Cir. 2015) ..... 7
*United States* v. *Hosking*, 567 F.3d 329 (7th Cir. 2009) ..... 10, 16, 24
*United States* v. *Janosko*, 642 F.3d 40 (1st Cir. 2011) ..... 15

Page

Cases—continued:

*United States* v. *Juvenile Female*, 296 F. App'x 547 (9th Cir. 2008) ..... *passim*
*United States* v. *Maynard*, 743 F.3d 374 (2d Cir. 2014) ..... 19, 20, 23
*United States* v. *Nosal*, 844 F.3d 1024 (9th Cir. 2016) ..... 16, 21, 22
*United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011) ..... *passim*
*United States* v. *Phillips*, 477 F.3d 215 (5th Cir. 2007) ..... 7, 8, 17, 18
*United States* v. *Riggin*, 522 F. App'x 381 (9th Cir. 2013) ..... 16, 22
*United States* v. *Skowron*, 529 F. App'x 71 (2d Cir. 2013) ..... 16, 24
*United States* v. *Stennis-Williams*, 557 F.3d 927 (8th Cir. 2009) ..... 10, 16, 17, 28
*United States* v. *Stratman*, No. 4:13-CR-3075, 2014 WL 3109805 (D. Neb. July 8, 2014) ..... 17
*United States* v. *Wong*, No. CR-12-0483 EMC, 2014 WL 2700925 (N.D. Cal. June 13, 2014) ..... 17
*Voisine* v. *United States*, 136 S. Ct. 2272 (2016) ..... 25

Statutes:

Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, § 204(a), 110 Stat. 1227 ..... *passim*
18 U.S.C. 3663A ..... 2, 11, 12, 28
18 U.S.C. 3663A(a)(1) ..... 3, 23
18 U.S.C. 3663A(a)(2) ..... 3, 7, 28
18 U.S.C. 3663A(b) ..... 28
18 U.S.C. 3663A(b)(1) ..... 4
18 U.S.C. 3663A(b)(2) ..... 4
18 U.S.C. 3663A(b)(3) ..... 4
18 U.S.C. 3663A(b)(4) ..... *passim*
18 U.S.C. 3663A(c) ..... 3, 4

Page

Statutes—continued:

18 U.S.C. 3663A(c)(1) ..... 3
18 U.S.C. 3663A(c)(3)(B) ..... 25
Pub. L. No. 103-322, § 40504,
108 Stat. 1796, 1947 ..... 4
Pub. L. No. 110-326, § 202, 122 Stat. 3560,
3561 (2008) ..... 5, 12
Victim and Witness Protection Act of 1982,
Pub. L. No. 97-291, § 5, 96 Stat. 1248 ..... 4, 14, 20, 28
18 U.S.C. 3663(a)(1)(A) ..... 4
18 U.S.C. 3663(b)(1) ..... 4
18 U.S.C. 3663(b)(2) ..... 4
18 U.S.C. 3663(b)(3) ..... 4
18 U.S.C. 3663(b)(4) ..... 4, 14, 28
18 U.S.C. 3663(b)(6) ..... 5, 12
28 U.S.C. 1254(1) ..... 1

Miscellaneous:

S. Rep. 104-179, 104th Cong., 1st Sess. 18 (1995) ..... 25

# In the Supreme Court of the United States

No.

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

Sergio Fernando Lagos respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is not yet published in the Federal Reporter but is available at 2017 WL 1049507. The judgment of the district court (App., *infra*, 12a-27a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on March 17, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

The relevant portions of the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, § 204(a), 110 Stat. 1227, codified at 18 U.S.C. 3663A, are reproduced in the appendix to this petition (App., *infra*, 41a-44a).

## INTRODUCTION

This case presents a clear and intractable circuit conflict over a significant question of federal criminal law. Under 18 U.S.C. 3663A(b)(4), courts must order restitution for certain crimes, reimbursing the victim for "necessary * * * expenses incurred during participation in the investigation or prosecution of the offense." In the decision below, the Fifth Circuit held that this provision authorizes restitution for a company's internal investigation and other expenses, even though the company's private costs were neither required nor requested by the government.

In reaching that conclusion, the court below expressly rejected the "opposite conclusion" from *United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011) (Kavanaugh, J.). In *Papagno*, the D.C. Circuit itself created a direct and acknowledged conflict with four courts of appeals, explaining that it had "carefully considered the[ir] reasoning" but "respectfully disagree[d]." *Id.* at 1101. In a concurrence below, Judge Higginson admitted he "agree[d]" with *Papagno* and found it "persuasive," but was bound by circuit precedent. Multiple courts of appeals have now encountered this issue after *Papagno* but refused to abandon their existing circuit authority.

This case easily checks off every traditional criteria for granting review. The circuit conflict is entrenched over an important and recurring question of federal statutory in-

terpretation. Indeed, this question is potentially implicated every time corporations engage in internal investigations or audits at the suspicion of wrongdoing. There is no point to further percolation: this issue has now reached *eight* courts of appeals, and there is no movement on either side of the split. And this case is an optimal vehicle for resolving the conflict: the facts are clean and undisputed, there are no alternative grounds for affirmance, and the question presented dictated the result below.

As it now stands, punishment for the same federal crime varies with the location of the convicting court. And a majority of jurisdictions—including the court below—are following a standard that is squarely at odds with Section 3663A(b)(4)'s plain text, structure, purpose, and history—and doing so in a manner that is "difficult to administer" and unnecessarily "challenging" for district courts. App., *infra*, 6a-11a (Higginson, J., concurring) ("I do not envy district courts faced with this task."). Further review is plainly warranted.

## STATEMENT

1. a. The MVRA was enacted in 1996 to require restitution for "victim[s]" of a wide subset of federal crimes, including certain violent crimes, property offenses, and fraud. See 18 U.S.C. 3663A(a)(1), (c). The Act defines "victim" as "a person directly and proximately harmed as a result of the commission" of any specified offense. 18 U.S.C. 3663A(a)(2). It "appl[ies] in all sentencing proceedings" for "any" covered crime. 18 U.S.C. 3663A(c)(1).

The MVRA makes restitution mandatory where it applies: "the court *shall* order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1) (emphasis added). While the order is mandatory, restitution is limited to four categories of eligible expenses: (1) the value of lost property (or the return of that

property, if possible); (2) medical and related expenses in cases of bodily injury; (3) "the cost of necessary funeral and related services" in cases of death; and (4) the category at issue here—"lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(1)-(4).

b. The MVRA is only part of the statutory landscape governing restitution. Congress enacted the MVRA against the backdrop of other laws, which also provide restitution in defined circumstances. The first major development in this area was the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5, 96 Stat. 1248, which authorizes *discretionary* restitution for a large set of crimes not covered by the MVRA. See 18 U.S.C. 3663(a)(1)(A) (listing offenses "other than an offense described in section 3663A(c)").

In addition to targeting a different set of crimes, the VWPA also enumerates different categories of relief. It includes the same first three categories of eligible expenses as the MVRA (18 U.S.C. 3663(b)(1)-(3)), but extends relief in two important respects. The first involves the VWPA's fourth category, which is similar but not identical to the MVRA: "lost income and necessary child care, transportation, and other expenses *related to* participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663(b)(4) (emphasis added); see also Pub. L. No. 103-322, § 40504, 108 Stat. 1796, 1947 (authorizing this fourth category). The MVRA, by contrast, is limited to expenses incurred "during" participation in the investigation or prosecution or attendance at related proceedings. 18 U.S.C. 3663A(b)(4).

The second involves a 2008 amendment providing additional relief to victims of identity theft: "the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense." 18 U.S.C. 3663(b)(6); see also Pub. L. No. 110-326, § 202, 122 Stat. 3560, 3561 (2008) (authorizing this addition). That language covers a host of additional expenses including "the costs of an internal investigation," but, again, applies "only to victims of identity theft," not the crimes covered by the MVRA. *United States* v. *Papagno*, 639 F.3d 1093, 1097 (D.C. Cir. 2011).

2. a. Petitioner entered a guilty plea to five counts of wire fraud and one count of conspiracy to commit wire fraud. App., *infra*, 1a. Petitioner and his co-conspirators owned companies that had a revolving loan with General Electric Capital Corporation (GECC), the relevant "victim" for MVRA purposes. Petitioner admitted that, for two years, "he and his co-conspirators misled GECC about the value of their accounts receivable to induce GECC to increase the amount of the revolving loan and to provide him and his co-defendants with uncollateralized funds." *Id.* at 4a. When the fraud was finally discovered, GECC invested substantial funds in conducting an internal investigation, employing "forensic experts," "lawyers," and "consultants" to determine the "full extent and magnitude" of the scheme. *Ibid.*[1] The fraud also caused petitioner's companies to file for bankruptcy. *Ibid.* GECC incurred additional legal fees participating in those bankruptcy proceedings, where "[t]he bankruptcy court or-

[1] "An 'internal investigation' is a term generally used when an organization asks an attorney, investigator, or auditor to look into suspected wrongdoing within the organization and determine, for example, what went wrong, whom to hold accountable, and how to prevent recurrence of the problem." *Papagno*, 639 F.3d at 1099 n.2.

dered GECC to continue to make advances to the defendants' companies." *Ibid.* The expenses at issue were incurred outside the context of the government's investigation and prosecution of the offense. *Id.* at 4a-5a.

b. In addition to a 97-month sentence of imprisonment, petitioner was ordered to pay restitution under the MVRA. App., *infra*, 16a, 23a-26a. As relevant here, the district court, over petitioner's objection, ordered "restitution for the legal, expert, and consulting fees incurred by [GECC] in investigating the fraud" and for GECC's "legal fees from the bankruptcy proceedings caused by the fraud." *Id.* at 1a-2a. As the government noted below, there was no dispute "over the accuracy of the fees contained in the victim impact statements." C.A. Gov't Br. 10. The sole dispute was over the "legal basis" for the restitution award. *Id.* at 38a ("There is no dispute that I see raised as to the numbers. The dispute is as to whether or not they should fit into the categories that they have been placed in.").

The district court ultimately concluded restitution was justified under the MVRA. It ordered restitution of $4,107,467.23 for GECC's investigative fees, and $788,897.88 for its legal fees in the bankruptcy case. App., *infra*, 35a, 39a; C.A. Gov't Br. 7 (citing C.A. Rec. 337-342, 345-348).[2]

3. a. The Fifth Circuit affirmed. App., *infra*, 1a-6a. The court held that the restitution order properly included the costs of GECC's internal investigation and bankruptcy-related expenses, finding those costs "consistent with payments upheld in our past cases." *Id.* at 1a-2a. It thus re-

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[2] The district court also ordered $11,074,047.04 in restitution for the unsecured principal of the loan at the time of petitioner's sentencing, but that aspect of the order is not disputed.

jected petitioner's argument that the MVRA "does not authorize restitution for the legal, expert, and consulting fees" that GECC incurred in "investigating the fraud" or participating in "the bankruptcy proceedings." *Ibid.*

The court explained that "the scope of restitution under subsection 3663A(b)(4) is controlled" by circuit precedent, which "gave a broad reading to § 3663A(b)(4)." App., *infra*, 2a-3a (discussing *United States* v. *Phillips*, 477 F.3d 215 (5th Cir. 2007), *United States* v. *Herrera*, 606 F. App'x 748 (5th Cir. 2015) (per curiam), and *United States* v. *Dwyer*, 275 F. App'x 269 (5th Cir. 2008)). Under that broad reading, the court had previously upheld restitution for "investigative audit costs," costs of internal "investigations" (including both "attorneys' fees" and "accounting fees"), and even other expenses "directly caused" by an offense, such as a university's "costs to notify [potential] victims" of a hacker's "data theft." *Id.* at 2a-3a.

Applying those decisions, the court held that the district court's restitution order was authorized by Section 3663A(b)(4). App., *infra*, 4a-5a. It found GECC's private investigation covered because petitioner's scheme "caused GECC to employ forensic experts to secure and preserve electronic data as well as lawyers and consultants to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud." *Id.* at 4a. And it found GECC's bankruptcy-related fees covered because they "were directly caused by [petitioner's] fraud for purposes of restitution." *Ibid.* (citing 18 U.S.C. 3663A(a)(2), (b)(4)). The court nowhere suggested that either set of expenses were justified as requested or required by government investigators or prosecutors.

The court expressly recognized that "the D.C. Circuit takes a narrower view of restitution under subsection 3663A(b)(4)." App., *infra*, 4a-5a (citing *United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011)). But it declared

itself bound by circuit authority: "Whatever the merits of the contrary reasoning in *Papagno*, this panel is bound by this Court's prior decision in *Phillips* and will follow it here." *Id.* at 5a; see also *id.* at 5a n.2 (asserting that the D.C. Circuit's "restrictive reading" is "unique among the circuits, several of which have come to the opposite conclusion, although without the benefit of *Papagno*'s reasoning") (citing pre-*Papagno* cases from the Second, Sixth, Seventh, Eighth, and Ninth Circuits—but doing so without discussing post-*Papagno* cases from three of those circuits).

b. Judge Higginson concurred. App., *infra*, 6a-11a. He joined the court's opinion but wrote separately "to suggest that we may be interpreting Section 3663A(b)(4) too broadly." *Id.* at 6a. Looking to the "'plain language and structure of the statute,'" he "agree[d] with the D.C. Circuit's persuasive interpretation of the statutory terms." *Id.* at 6a-7a (citing *Papagno*, 639 F.3d at 1098-1101). Under that interpretation, "'participating' in a government investigation does not embrace an internal investigation, 'at least one that has not been required or requested by criminal investigators or prosecutors.'" *Ibid.* (citing *Papagno*, 639 F.3d at 1098-1099).

Judge Higginson also demonstrated that "three additional points support the D.C. Circuit's narrow reading of the statute." App., *infra*, 7a. First, employing the "*noscitur a sociis* canon," he found that the relevant expenses here, like all other covered expenses, "must take place within the context of the government's criminal enforcement." *Ibid.* Second, he explained that "a broad reading of Section 3663A(b)(4) is difficult to administer," citing confusion among the circuits adopting the majority position. *Id.* at 7a-10a; see also *id.* at 8a (explaining that the majority approach "requires district courts to undertake

difficult analyses," and declaring that "I do not envy district courts faced with this task"). Finally, he noted that "limiting the reach of Section 3663A(b)(4) does not prevent victims from fully recovering their losses": "there are a number of other more explicit and specific criminal restitution provisions that may allow for recovery," and "where criminal restitution statutes fall short, victims may bring their own civil actions to recover their losses." *Id.* at 10a-11a.

## REASONS FOR GRANTING THE PETITION

This case readily satisfies the Court's traditional criteria for review. The proper interpretation of Section 3663A(b)(4) has openly divided the courts of appeals and now split panels on two other circuits. The question presented has been decided in eight courts of appeals; the arguments on each side are clear and well-developed. Each side of the split has recognized the conflict and refused to abandon its own position. It is inconceivable that the conflict will somehow resolve itself.

Further review is thus necessary to eliminate the entrenched conflict, and this case is an ideal vehicle for resolving the confusion. The decision below turned directly on the pure question of law at the heart of the split. And the facts are representative of the disputes frequently arising in cases nationwide: companies routinely conduct unprompted internal investigations after detecting hints of fraud, which is precisely what occurred here. Had this case arisen in D.C. instead of Texas, it indisputably would have come out the other way. And until this Court intervenes, the conflict will persist and federal punishments will vary based on the happenstance of where defendants are sentenced. The petition for a writ of certiorari should be granted.

### A. There Is A Widely Acknowledged And Intractable Circuit Conflict Over The Scope Of 18 U.S.C. 3663A(b)(4)

The Fifth Circuit's decision further entrenches a preexisting and recognized conflict over the scope of the MVRA's restitution provision.

1. a. In *United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011) (Kavanaugh, J.), the D.C. Circuit held that Section 3663A(b)(4) does not "authorize restitution for the costs of an organization's internal investigation, at least when (as here) the internal investigation was neither required nor requested by the criminal investigators or prosecutors." 639 F.3d at 1095. In reaching that conclusion, the court "recognize[d] that several other courts of appeals have taken a broader view of the restitution provision at issue here." *Id.* at 1101 (citing the Second, Sixth, Seventh, and Eighth Circuits).[3] The D.C. Circuit "carefully considered the reasoning of those decisions but respectfully disagree[d]." *Ibid.*

The relevant facts were straightforward. An employee of the Naval Research Laboratory stole 19,709 pieces of computer equipment from his employer over a ten-year period. 639 F.3d at 1095. After pleading guilty, the employee was ordered to pay $160,000 in restitution, which "cover[ed] the costs the Laboratory incurred in conducting an internal investigation of the wrongdoing." 639 F.3d at 1094. The government argued that the restitution was authorized under Section 3663A(b)(4) as "'necessary * * * expenses incurred during participation in the investigation or prosecution of the offense,'" even though no

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[3] See *United States* v. *Elson*, 577 F.3d 713 (6th Cir. 2009); *United States* v. *Hosking*, 567 F.3d 329 (7th Cir. 2009); *United States* v. *Stennis-Williams*, 557 F.3d 927 (8th Cir. 2009); *United States* v. *Amato*, 540 F.3d 153 (2d Cir. 2008).

one had "asked [the Laboratory] to conduct its internal investigation." *Id.* at 1094-1095. The D.C. Circuit rejected the government's argument: "In our view, an internal investigation that is neither required nor requested by criminal investigators or prosecutors does not entail the organization's '*participation* in the investigation or prosecution of the offense.'" *Id.* at 1095 (quoting 18 U.S.C. 3663A(b)(4)) (emphasis in original).

The court supported its decision with a detailed examination of the text, structure, purpose, and history of Section 3663A. After outlining the "statutory landscape with respect to restitution," 639 F.3d at 1096-1097, the court began with the statute's plain text. *Id.* at 1097 ("We must determine the meaning of 'necessary * * * expenses incurred during participation in the investigation or prosecution of the offense."). It first noted that "offense" in Section 3663A(b)(4) is phrased in the "singular," and "[t]he singular 'investigation or prosecution' of 'the offense' is therefore the criminal investigation and prosecution that is usually conducted by the FBI or other federal investigators." *Id.* at 1097-1098.

The court then rejected the government's argument that a private party could "participate" in that singular "investigation or prosecution" merely by "*assist[ing]* the criminal investigation or prosecution." 639 F.3d at 1098. As the court explained, there is no basis for "equat[ing]" the term "participation" (which appears in the statute) with the term "assistance" (which does not). *Ibid.* "In common parlance, the two terms are not equivalent"; "the Supreme Court has rejected the proposition that 'aid' equals 'participation'"; and the "dictionary definition of 'participation' is the 'act of taking part or sharing in something,'" which is *narrower* than to "assist." *Ibid.* (citing, among others, *Reves* v. *Ernst & Young*, 507 U.S. 170, 178-179 (1993), and *Pennsylvania Dep't of Corrections* v. *Yeskey*,

524 U.S. 206, 211 (1998)). The court thus concluded that "the Naval Research Laboratory was not participating in the criminal investigation or prosecution of Papagno when it conducted its internal investigation": the "possibility that the Laboratory's internal investigation might later assist the criminal investigation or prosecution—for example, in plea negotiations—does not mean those who conducted the internal investigation were somehow taking part in the separate, criminal investigation or prosecution conducted by the criminal investigators and prosecutors." *Id.* at 1098-1099.

The government's contrary view, the court continued, would produce an obvious "oddity": "If assisting the criminal investigation were alone enough to constitute 'participation' in the criminal investigation, as the Government argues, then even an internal investigation that *preceded* the criminal investigation could qualify as 'participation.'" 639 F.3d at 1099. Yet "one cannot ordinarily be participating in something that has not yet begun." *Ibid.* (characterizing this result as "anomalous at best").

Next, the court explained that its reading was "buttressed" by contrasting Section 3663A with Congress's 2008 amendment to the related "discretionary restitution statute." 639 F.3d at 1099 (citing 18 U.S.C. 3663(b)(6)). In that amendment, Congress specifically expanded the relief available to victims of identity theft, but not other crimes, and, unlike here, chose language that would capture "an organization's internal investigation." *Ibid.* (explaining that the new language in 18 U.S.C. 3663(b)(6) "would authorize the restitution the Government is seeking in this case, if it applied to Papagno's crime"—"[b]ut it doesn't"). As the court explained, "[w]e thus must assume Congress acted intentionally (in 2008 and before) in deciding when to authorize restitution for costs of the kind associated with internal investigations." *Id.* at 1099-1100

& n.3 (invoking the familiar principle that "when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *Kucana* v. *Holder*, 558 U.S. 233, 249 (2010)).

Finally, the court noted an "additional problem" with the government's interpretation: the statute limits restitution to "necessary" costs, and "[i]t is difficult—indeed, impossible—to argue that an internal investigation neither required nor requested by criminal investigators was an expense *necessary*" for the Laboratory's "participation in the investigation or prosecution." 639 F.3d at 1100.

The court concluded by stating that Section 3663A(b)(4) is "not a consequential damages statute." 639 F.3d at 1100. Its text "has a narrower focus," and "this particular restitution provision—unlike some others—does not afford a right to reimbursement for all costs caused in some sense by the defendant." *Ibid.* Courts, in sum, "cannot distort the language of this statute to achieve an objective that its text does not reach." *Ibid.* The court thus "carefully considered" but rejected the "broader view" adopted by other circuits. *Id.* at 1101.

b. This issue has also split panels on two other circuits, with judges separately adopting the D.C. Circuit's position.

First, as discussed above, this issue divided the Fifth Circuit in this case. Judge Higginson was bound by circuit precedent, but stated that he "agree[d]" with *Papagno*'s "persuasive interpretation" and offered multiple "additional points" supporting *Papagno*'s "narrow reading of the statute." App., *infra*, 6a-7a. Had this issue not been previously resolved in the Fifth Circuit, Judge Higginson indisputably would have voted the opposite way.

Second, this issue has split the Ninth Circuit. See *United States* v. *Juvenile Female*, 296 F. App'x 547, 550 (9th Cir. 2008) (Berzon, J., dissenting). As the panel majority explained, "[t]his circuit has adopted a *broad* view" of Section 3663A(b)(4). 296 F. App'x at 549 (emphasis in original). Under that "broad" view, restitution is "[g]enerally" allowed whenever a party's "investigation costs" are "a direct and foreseeable result of the defendant's wrongful conduct." *Ibid.* (quoting *United States* v. *Gordon*, 393 F.3d 1044, 1056-1057 (9th Cir. 2004)).

In dissent, Judge Berzon rejected that reading of the statute. *Id.* at 550-552 (Berzon, J., dissenting). Taking the same position as the D.C. Circuit, she found it "plain" that "'*the* investigation' for which restitution is available under § 3663A(b)(4) is the government's official investigation, not an entirely separate one engaged in by the victim's relatives." *Id.* at 551. As she viewed it, "it is participation in *the* investigation—the government's investigation—that is subject to restitution, not costs incurred when striking out on one's own." *Ibid.* (distinguishing other cases because there was no "indication that [the victim] recovered restitution for investigations it undertook *independently of government subpoenas and information requests*") (emphasis added).

She further supported her reading with a "critical" difference between the MVRA's Section 3663A(b)(4) and the VWPA's Section 3663(b)(4). While Section 3663(b)(4) covers "expenses *related to* participation in the investigation," Section 3663A(b)(4), by contrast, is limited to expenses "*during* participation in the investigation." 296 F. App'x at 551 (Berzon, J. dissenting) (emphases in original). Judge Berzon explained that "[t]he difference is both obvious and significant": "Whether or not [the victim's] investigative activities were 'related to' participation in the

government's investigation, they did not occur 'during participation' in it." *Ibid.*

c. The restitution order below accordingly would have been reversed in the D.C. Circuit or under the minority position of divided panels in two additional courts of appeals.

2. As courts have widely recognized, the D.C. Circuit's decision squarely conflicts with the contrary view of multiple circuits. *E.g.*, App., *infra*, 4a-5a & n.2 (the D.C. Circuit's "restrictive reading, however, is unique among the circuits, several of which have come to the opposite conclusion"). While many of these circuits adopted their position before *Papagno*, four courts of appeals have now retained their position even after confronting the direct conflict with *Papagno*. The circuit split on this issue is therefore undeniable and entrenched.

a. The D.C. Circuit's decision conflicts with decisions of the First, Second, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits. In direct conflict with *Papagno*, each of these circuits has held that Section 3663A(b)(4) covers the costs of internal investigations and other expenses that were "neither required nor requested by the criminal investigators or prosecutors." *Papagno*, 639 F.3d at 1095. See, *e.g.*, *United States* v. *Janosko*, 642 F.3d 40, 42 (1st Cir. 2011) (allowing expenses for unprompted credit checks); *United States* v. *Amato*, 540 F.3d 153, 162 (2d Cir. 2008) (allowing restitution for "attorney fees and auditing costs" separately incurred in the victim's "own internal investigation" of the defendant's fraud); App., *infra*, 1a-5a (allowing restitution for attorney's fees and costs of an unprompted internal investigation and independent participation in related bankruptcy proceedings); *United States* v. *Elson*, 577 F.3d 713, 727-728 (6th Cir. 2009) (allowing restitution for the victim's "significant

costs and fees in discovering and investigating the numerous layers of shill corporations and nominees related to [the defendant's] fraud," despite the lack of any noted direction from the government); *United States* v. *Hosking*, 567 F.3d 329, 332 (7th Cir. 2009) ("affirm[ing] the principle of including a private victim's investigative costs in the restitution award" under Section 3663A(b)(4), again without evidence of any government request or requirement); *United States* v. *Stennis-Williams*, 557 F.3d 927, 928, 930 (8th Cir. 2009) (approving restitution for self-incurred "attorney and accountant fees to discover and investigate Defendant's malfeasance"); *United States* v. *Nosal*, 844 F.3d 1024, 1045, 1047 (9th Cir. 2016) (affirming "the award for internal investigation costs" initiated without the government's direction).[4]

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[4] This body of authority represents only part of the multitude of decisions on this issue. See, *e.g.*, *United States* v. *Skowron*, 529 F. App'x 71, 75 (2d Cir. 2013) (under *Amato*'s reasoning, affirming restitution for costs of an internal investigation); *United States* v. *Bahel*, 662 F.3d 610, 648 (2d Cir. 2011) (relying on *Amato* to approve restitution for "outside counsel in connection with investigations into internal fraud"); *United States* v. *DeRosier*, 501 F.3d 888, 891-892, 896-897 & n.2 (8th Cir. 2007) (approving restitution for (i) an internal investigation "motivated by [the victim's] own business interests," and (ii) attorney's fees incurred pursuing a civil judgment against the defendant); *United States* v. *Eyraud*, 809 F.3d 462, 468 (9th Cir. 2015) (reiterating the Ninth Circuit's "*broad* view of the restitution authorization [for investigation costs]" and affirming an award of victim's expenses "as part of its continuing investigation of the extent of Eyraud's thievery") (alteration and emphasis in original); *United States* v. *Riggin*, 522 F. App'x 381, 382 (9th Cir. 2013) (affirming restitution for the victim's "internal eight-week audit"); *United States* v. *Henrie*, 177 F. App'x 677, 677 (9th Cir. 2006) ("The district court did not err by ordering Henrie to pay restitution for accounting and legal expenses the victim incurred to investigate the scope of Henrie's theft."); *United States* v. *Adcock*, 534 F.3d 635, 643 (7th Cir. 2008) (holding that Section 3663A(b)(4) covers the costs of an internal audit

It is also indisputable that the covered expenses, as here, were incurred outside the context of the government's official investigation or prosecution. See, *e.g.*, *Amato*, 540 F.3d at 162 ("That [defendants'] fraud would force the [victim] corporation to expend large sums of money on its own internal investigation *as well as* its participation in the government's investigation and prosecution of defendants' offenses is not surprising.") (emphasis added); *Stennis-Williams*, 557 F.3d at 930 ("This court has held that *privately incurred* investigative costs constitute foreseeable losses that are directly caused by a defendant's fraudulent conduct.") (emphasis added); *Elson*, 577 F.3d at 728 ("While Bourke did not investigate the fraud as part of the government's prosecution of Elson and his co-conspirators, Bourke's costs and fees 'constitute foreseeable losses that [we]re directly caused' by the conspiracy's act of concealing Schultz's assets from creditors such as Bourke.") (quoting *Stennis-Williams*, 557 F.3d at 930) (alteration in original).

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"that uncovered [the defendant's] wrongdoing"); see also *United States* v. *Gupta*, 925 F. Supp. 2d 581, 585 (S.D.N.Y. 2013) (rejecting *Papagno* and explaining that "the Second Circuit has taken a very broad view" of Section 3663A(b)(4); allowing "expenses incurred during Goldman Sachs's internal investigation" and "expenses incurred for work related to Goldman Sachs's advancement of Gupta's legal fees"); *United States* v. *Stratman*, No. 4:13-CR-3075, 2014 WL 3109805, at *2 (D. Neb. July 8, 2014) (agreeing that private-investigative costs may satisfy Section 3663A(b)(4)) (citing *Stennis-Williams* and the Fifth Circuit's *Phillips* decision); *United States* v. *Wong*, No. CR-12-0483 EMC, 2014 WL 2700925, at *4 (N.D. Cal. June 13, 2014) (stating that "the *Papagno* court recognized that its holding was in conflict with the holdings of a number of other circuits," and adopting the opposite conclusion—"internal investigation costs are properly included in a restitution award"); *United States* v. *Greany*, No. 14-10061-RWZ, 2014 WL 4205385, at *1 (D. Mass. Aug. 25, 2014) (allowing internal forensic accounting costs) (citing *Elson*, *Stennis-Williams*, *Dwyer*, *Amato*, and *Henrie*).

There accordingly is no serious dispute that the conflict is square and established. Unlike *Papagno*, these circuits have directly held that Section 3663A(b)(4) permits broad recovery, despite the lack of any "required" or "requested" participation in the government's efforts. Indeed, these circuits generally authorize restitution so long as the crime *caused* the expense, whatever its relationship (or not) with the government's investigation. See, *e.g.*, *Eyraud*, 809 F.3d at 467 (stating that the MVRA covers "any loss—not just those incurred during investigation or prosecution—* * * suffered as a result of a defendant's qualifying crime," as long as "the MVRA's causation standard is satisfied"). Had these cases arisen in the D.C. Circuit, they would have come out the opposite way. *Papagno*, 639 F.3d at 1100 ("This is a not a consequential damages statute.").

b. Nor have these courts simply overlooked *Papagno*. Four courts of appeals have now considered the issue *after* the D.C. Circuit's decision, and all four have expressly adhered to their "broad" interpretation of Section 3663A(b)(4).

i. First and foremost, the Fifth Circuit below expressly refused to follow *Papagno* in light of existing circuit authority: "Whatever the merits of the contrary reasoning in *Papagno*, this panel is bound by this Court's prior decision in *Phillips* and will follow it here." App., *infra*, 5a. Indeed, Judge Higginson concurred despite *disagreeing* with the Fifth Circuit's reading of the statute, calling it "too broad[]." *Id.* at 6a. Given that the Fifth Circuit has followed *Phillips* on multiple occasions (see, *e.g.*, App., *infra*, 3a), it is implausible that the Fifth Circuit will reverse course absent this Court's intervention.

ii. In *United States* v. *Maynard*, the Second Circuit also recognized that its "broad view" departed from *Pa-*

*pagno*'s interpretation, but it still reaffirmed its prior decisions. 743 F.3d 374, 380-382 (2d Cir. 2014). It explained, for example, that *Amato* covered "attorney's fees and accounting costs" in "an internal investigation," "notwithstanding that not all of the effort and expense was required by the government." *Id.* at 381 (citing *Amato*, 540 F.3d at 159-160); contra *Papagno*, 639 F.3d at 1095 (accepting the opposite proposition). *Maynard* even highlighted *Amato*'s finding that "'*assist[ing]*'" the prosecution was sufficient, *Maynard*, 743 F.3d at 381 (emphasis added), the precise argument rejected by the D.C. Circuit, *Papagno*, 639 F.3d at 1098-1099 (refuting that Section 3663A(b)(4) covers "anything that significantly *assists* the criminal investigation or prosecution").

In earlier Second Circuit cases, *Maynard* continued, "the internal investigations paid for by the victims unmasked fraud and *led to investigations* conducted by the authorities." 743 F.3d at 381 (emphasis added). Unlike the D.C. Circuit, the Second Circuit found it irrelevant that the expenses thus "*preceded* the criminal investigation" and were "not required or requested by the government," *Papagno*, 639 F.3d at 1099. It was enough that the expenses were "necessary" to protect the victim's legitimate interests ("the integrity of its ongoing operations and reputation"), and "the investigation was a means calculated to achieve the protection of those interests." *Maynard*, 743 F.3d at 381. Those findings categorically fail *Papagno*'s standard.[5]

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[5] Although *Maynard* ultimately denied restitution for the claimed expenses—a bank's costs for wanted posters and a temporary security guard—it did so only because those expenses "served no investigatory purpose," 743 F.3d at 381-382, not because those expenses were not "required or requested by criminal investigators or prosecutors," *Papagno*, 639 F.3d at 1099.

Moreover, the Second Circuit has since further entrenched *Maynard*'s reasoning and even "extend[ed]" it to the VWPA. *United States* v. *Cuti*, 778 F.3d 83, 93-94 (2d Cir. 2014). In *Cuti*, the court again admitted that the circuit's "'broad view'" of restitution conflicted with *Papagno*. *Id.* at 93. It nonetheless held that *Maynard* supported reading the VWPA to include unsolicited "internal investigations." *Id.* at 94. And *Cuti* specifically rejected the argument that restitution is unavailable for costs "incurred prior to the beginning of the government's investigation." *Id.* at 96 n.5. While *Papagno* strictly excluded such expenses under Section 3663A(b)(4), see 639 F.3d at 1099, the Second Circuit found that position incompatible with *Amato*, "which permitted restitution for attorney's fees incurred prior to the government's investigation," *Cuti*, 778 F.3d at 96 n.5 (citing *Amato*, 540 F.3d at 162).[6] The Second Circuit has thus not only cemented its interpretation of Section 3663A(b)(4), but squarely rejected both *Papagno*'s holding and its core rationale.

iii. The Eighth Circuit has likewise acknowledged the conflict with the D.C. Circuit without reconsidering its existing precedent. In *United States* v. *Carpenter*, the court rejected the defendant's reliance on *Papagno*, which the court read as refusing restitution for "internal investigation[s]" where "there was no evidence the investigation

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[6] *Cuti* recognized the difficulty of saying expenses incurred *before* the government's investigation were somehow incurred "during" that investigation. 778 F.3d at 96 n.5 (explaining how the MVRA's text "differs" from the VWPA's text). Compare *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting) (making exactly this point). While *Cuti* was able to sidestep the issue for the VWPA, it also acknowledged that *Amato*'s opposite conclusion was controlling. 778 F.3d at 96 n.5.

was ever requested by criminal investigators or prosecutors." 841 F.3d 1057, 1061-1062 (8th Cir. 2016) (describing *Papagno*). The court explained that "[o]ur circuit has taken a somewhat broader view of the loss that can be included in a restitution award," "'specifically approv[ing] the inclusion of attorney's fees and investigative costs * * * when these losses were caused by the fraudulent conduct.'" *Id.* at 1062 (quoting *DeRosier*, 501 F.3d at 897).[7] It accordingly rejected the D.C. Circuit's "per se prohibition on awarding restitution for attorney's fees or investigative costs" outside the government's criminal enforcement. *Ibid.*

iv. Finally, the Ninth Circuit has expressly disavowed *Papagno*: "Unlike some other circuits, we have 'adopted a *broad* view of the restitution authorized [for investigation costs].'" *United States* v. *Nosal*, 844 F.3d 1024, 1047 (9th Cir. 2016) (citing *Papagno* and quoting *Gordon*, 393 F.3d at 1056-1057) (internal quotation marks omitted).[8] "With

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[7] *DeRosier* specifically authorized restitution for an internal investigation "prompted for the [victim's] own benefit," "motivated by its own business interests," and "commenced well before an indictment was brought." 501 F.3d at 895 & n.11 ("We realize that TierOne had a responsibility as a financial institution to report suspicious activity to law enforcement, and as such provided the results of its own internal investigation to the FBI. However, to reiterate, TierOne's investigation was motivated by its own business interests, and its investigation commenced well before an indictment was brought * * * ."); *id.* at 891 ("When TierOne was alerted to DeRosier's suspicious activity, it initiated an investigation.").

[8] The Fifth Circuit below incorrectly counted *United States* v. *Gordon*, 393 F.3d 1044, 1056-1057 (9th Cir. 2004), as part of the circuit conflict. App., *infra*, 5a n.2. *Gordon*, however, is distinguishable, because the investigation at issue was "in response to five grand jury subpoenas and a number of government requests requiring Cisco to analyze vast amounts of documentation and electronic information." 393 F.3d at 1057. In all fairness, however, the Ninth Circuit itself has

respect to investigation costs and attorneys' fees, our rule is clear: restitution for such losses may be recoverable where the harm was the direct and foreseeable result of the defendant's wrongful conduct * * * ." *Ibid.* (internal quotation marks omitted). The court accordingly upheld restitution for a victim's "internal investigation costs incurred in attempting to ascertain the nature and scope of [a computer] breach." *Id.* at 1045; see also *id.* at 1047 ("[w]e agree with the award for internal investigation costs to uncover the extent of the breach"); *Eyraud*, 809 F.3d at 467-468 (authorizing restitution for a "continuing investigation" apart from the government's efforts; "[t]he textual reach of § 3663A(b)(4) manifestly covers the entirety of the attorneys' fees award to RBS, not just those incurred leading up to and during the grand jury proceedings"); *United States* v. *Riggin*, 522 F. App'x 381, 382 (9th Cir. 2013) (authorizing restitution for "a comprehensive internal audit to determine the extent of the company's losses"). Those costs would have been disallowed under *Papagno*.

* * *

The conflict with the D.C. Circuit is both indisputable and entrenched. The D.C. Circuit undertook an extensive analysis of Section 3663A(b)(4), and it unanimously considered and rejected the holdings of *four* other circuits, despite "carefully consider[ing] the[ir] reasoning." *Papagno*, 639 F.3d at 1101. And four courts of appeals have now had a full opportunity to consider *Papagno*'s extensive analysis without a hint that *any* of them was prepared to reconsider their views. There is no reason to believe

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overlooked this aspect of *Gordon*. See, *e.g.*, *Nosal*, 844 F.3d at 1047; *Eyraud*, 809 F.3d at 468; cf. also *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting) (losing this argument in dissent).

that the D.C. Circuit will rethink *Papagno*, and it is inconceivable that all *seven* courts of appeals in the majority will suddenly overrule their own precedent and side with the D.C. Circuit. There is no realistic possibility that this conflict will somehow resolve itself. The circuit split over this important issue will thus persist until this Court intervenes.

### B. The Proper Construction Of Section 3663A(b)(4) Is A Recurring Question Of Great Importance

This case presents a clear and developed conflict on an important question of statutory construction that repeatedly arises in criminal cases nationwide. It will continue to generate conflicts and confusion until it is resolved by this Court. Further review is plainly warranted.

1. This question arises all the time in ordinary criminal prosecutions across the country, as reflected by the substantial body of circuit law on the issue. See Part A, *supra* (explaining that *eight* courts of appeals have decided the question in dozens of decisions). Restitution is mandatory under Section 3663A(a)(1), and companies regularly conduct audits and investigations in response to hints of fraud. See, *e.g.*, *Maynard*, 743 F.3d at 381 (suggesting companies have a "duty" to act "when faced with evidence, indicia, or a grounded suspicion of internal misconduct"). These questions will thus arise every time entities detect internal issues or inconsistencies and devote resources to uncovering the problem. The law should be clear whether these common expenses are subject to Section 3663A(b)(4).

2. The question is undeniably important. Uniformity is critical in the criminal context. Basic notions of fairness mean that punishments should not differ based solely on whether a defendant was convicted in the District of Columbia or in Texas. Cf., *e.g.*, *Kimbrough* v. *United States*,

552 U.S. 85, 107 (2007) ("it is unquestioned that uniformity remains an important goal of sentencing").

And the real-world differences here are substantial. Restitution orders often involve significant sums that affect defendants and victims in material ways. Here, for example, the restitution order included nearly $5 million of private fees and expenses that would have been categorically excluded under *Papagno*. And other cases involve similarly meaningful sums. See, *e.g.*, *Papagno*, 639 F.3d at 1095 ($160,000 in expenses); *Bahel*, 662 F.3d at 648 (nearly $850,000 in legal fees); *Hosking*, 567 F.3d at 331 ($125,000 in investigation expenses); *Skowron*, 529 F. App'x at 73 ($3.827 million in expenses). The outcome has a real impact on all parties, and it likewise colors plea negotiations—where the vast majority of criminal cases are now resolved. *E.g.*, *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012) ("[n]inety-seven percent of federal convictions" result from guilty pleas).

Prosecutors, defendants, and courts all benefit from clarity about the possible consequences of a plea. Cf., *e.g.*, *Padilla* v. *Kentucky*, 559 U.S. 356, 373 (2010) ("informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process"). The resultant uncertainties about the proper scope of a restitution order frustrates the criminal-justice process.

3. It is also critical that rules and standards in the criminal context are administrable, yet the majority view is arbitrary and unworkable. As Judge Higginson explained, the "broad view of Section 3663A(b)(4) requires district courts to undertake" a number of "difficult analyses." App., *infra*, 8a; see also *id.* at 8a-9a (posing a series of thorny, but common, hypotheticals to illustrate the problems with the majority's approach). A rule that requires "challenging restitution calculations," *id.* at 10a, is

directly at odds with the MVRA's concerns about "complicat[ing] or prolong[ing] the sentencing process." 18 U.S.C. 3663A(c)(3)(B); cf. S. Rep. 104-179, 104th Cong., 1st Sess. 18 (1995) ("guaranteeing that the sentencing phase of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings"). While "Congress is free to require, and wise policy may dictate, that courts answer difficult questions," there is no basis for "requiring sentencing judges to undertake challenging restitution calculations when * * * the statute does not require the inquiry." App., *infra*, 10a (Higginson, J., concurring).[9]

4. Nor is this question any less important because the majority of the courts of appeals have rejected the D.C. Circuit's position. The *Papagno* decision reflects the most extensive analysis of any case resolving the issue, likely followed by Judge Higginson's concurrence below and Judge Berzon's dissent in *Juvenile Female*. The robust arguments supporting petitioner's view thus readily counter-balance the simple head-counting on the other side. And this Court routinely grants review in criminal cases involving comparable splits. See, *e.g.*, *Voisine* v. *United States*, 136 S. Ct. 2272 (2016) (9-1 split); *Lockhart* v. *United States*, 136 S. Ct. 958 (2016) (5-1 split). Indeed, just this Term, the Court granted certiorari to resolve a conflict between five courts of appeals and the D.C. Circuit in a criminal case. See *Honeycutt* v. *United States*, No. 16-142, slip op. 3 & n.3 (U.S. June 5, 2017) (outlining the 5-1 conflict).

The arguments on each side have been ventilated and additional percolation would prove pointless. The split

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[9] Indeed, as Judge Higginson observed, the majority test itself generates substantial confusion over what expenses are ultimately covered. App., *infra*, 7a-8a.

over this important question is entrenched: one interpretation is correct and the other is wrong, and neither side will back down. Waiting for the few remaining circuits to pick sides will only generate additional confusion over a criminal statute that ought to be uniform. Only this Court can resolve the conflict, and its review is plainly warranted.

### C. This Case Is An Optimal Vehicle For Deciding The Question Presented

This case is the ideal vehicle to resolve the question presented. The facts are clear and directly implicate the core of the circuit conflict. The restitution order includes the costs of an internal investigation and expenses in bankruptcy proceedings. There is no hint that these costs were "required or requested by criminal investigators or prosecutors," *Papagno*, 639 F.3d at 1098-1099, or that the victim's expenses arose "within the context of the government's criminal enforcement," App., *infra*, 7a (Higginson, J., concurring). Petitioner argued that the costs were excluded under *Papagno*, and the Fifth Circuit rejected that argument based on its "broader" circuit authority. App., *infra*, 4a-5a & n.2.[10] The outcome turned directly on the

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[10] See also C.A. Gov't Br. 18-21 ("In support of his argument that the United States failed to present evidence that the fees were necessary and incurred during the participation of the criminal investigation, Lagos refers this Court to *United States* v. *Papagno* * * * . The Fifth Circuit, and a majority of sister circuits, explicitly reject this narrow view of the inclusion of fees as restitution under § 3663A(b)(4) (i.e., that for investigation fees to be part of restitution, they must be conducted at the request of criminal investigators or prosecutors). * * * Here, Lagos's wire fraud scheme caused GECC to employ forensic experts to secure and preserve electronic data, lawyers and consultants to investigate the full extent and magnitude of the two-year fraud, and to provide legal advice relating to the fraud. * * * Accordingly, under this Circuit's and the majority of circuit's authority,

scope of Section 3663A(b)(4), and it is undisputed (and indisputable) that petitioner would have prevailed in the D.C. Circuit but instead lost because the prosecution arose in the Fifth Circuit.

Nor are there any alternative grounds for affirmance. The entire dispute turns on a pure question of statutory construction, and the Fifth Circuit's answer provided the sole basis for its disposition. This is a perfect vehicle for resolving this exceptionally important question.

**D. The Decision Below Is Incorrect**

Review is also warranted because the decision below is wrong. As the D.C. Circuit established, the majority position is incompatible with Section 3663A(b)(4)'s text, purpose, structure, and history. Judges Berzon and Higginson have illustrated even further errors in the majority position. Yet despite these plain errors, four courts of appeals have retained their position—likely because few courts are willing to reconsider established circuit law to abandon the majority side of a 7-1 split.

And that is true even where, as here, the majority position is particularly weak. The courts of appeals, for example, have decided the issue based on a number of demonstrable errors: (i) because the statute reimburses for participating in an investigation, they have presumed that *any* investigation qualifies, an assumption refuted by the statute's plain text;[11] (ii) they have included any expenses

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fees incurred by GECC during the investigation of the fraud were necessary and compensable in the restitution award.").

[11] Compare, *e.g.*, *Amato*, 540 F.3d at 162 (authorizing restitution for *both* a corporation's "own internal investigation" *and* "its participation in the government's investigation and prosecution"); with *Papagno*, 639 F.3d at 1097-1098 ("[t]he singular 'investigation or prosecution' of 'the offense' is therefore the criminal investigation and prosecution" conducted by the government); *Juvenile Female*, 296 F.

directly or proximately caused by the crime—a standard found in Section 3663A(a)(2) in *defining which "victims" are eligible for restitution*, but wholly absent from Section 3663A(b) in defining *eligible restitution expenses*;[12] and (iii) they have relied on case law construing VWPA's Section 3663(b)(4), without recognizing the critical textual difference in MVRA's Section 3663A(b)(4).[13] These courts have not responded in any material way to *Papagno* or justified their own "broad" reading of Section 3663A(b)(4); they simply repeat the same mistakes and explain they are bound by circuit law.

Even though the majority's reasoning is remarkably thin, there is still no reasonable prospect that the split will be resolved on its own. As explained above, it would take a seismic shift of *seven* circuits to reconsider their views in order to correct this obvious misreading of the statute. And yet *none* of those circuits to date has budged, despite failing to grapple with the D.C. Circuit's critique on the

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App'x at 551 (Berzon, J., dissenting) ("it is participation in *the* investigation—the government's investigation—that is subject to restitution, not costs incurred when striking out on one's own").

[12] Compare, *e.g.*, App., *infra*, 4a (authorizing fees "directly caused" by defendant's "wire fraud scheme"); *Stennis-Williams*, 557 F.3d at 930 (asking only whether expenses "were directly caused by a defendant's fraudulent conduct"); and C.A. Gov't Br. 10 ("This Court's precedent as well as a majority of Circuit precedent interpret 18 U.S.C. § 3663A as expressly authorizing such expenses for restitution, where, as here, the expenses are shown to be directly caused by the defendant's fraud."), with *Papagno*, 639 F.3d at 1100 ("this particular restitution provision—unlike some others—does not afford a right to reimbursement for all costs caused in some sense by the defendant").

[13] Compare, *e.g.*, *Eyraud*, 809 F.3d at 468 (relying on *United States* v. *Cummings*, 281 F.3d 1046 (9th Cir. 2002)); and *Juvenile Female*, 296 F. App'x at 550 & n.1 (following *Cummings*); with *id.* at 551 (Berzon, J., dissenting) (explaining the majority's error).

merits or even make a minimal attempt to identify an analytical foundation for their contrary view.

Further review is warranted to correct the court of appeals' incorrect interpretation of this important criminal-law provision.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2017

# APPENDIX

## TABLE OF CONTENTS


Appendix A: Court of appeals opinion, Mar. 23, 2017 ..... 1a

Appendix B: District court judgment, Feb. 18, 2016 ..... 12a

Appendix C: Trial transcript of the sentencing proceeding, Feb. 8, 2016 ..... 28a

Appendix D: Court of appeals judgment, Mar. 17, 2017 ..... 40a

Appendix E: Statutory provision ..... 41a

## APPENDIX A

REVISED March 23, 2017

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20146

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

SERGIO FERNANDO LAGOS, Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

Filed: March 17, 2017

Before: PRADO and HIGGINSON, Circuit Judges.*

## OPINION

EDWARD C. PRADO, Circuit Judge:

Sergio Fernando Lagos challenges the district court's order of restitution imposed following his guilty plea to one count of conspiracy to commit wire fraud and to five counts of wire fraud. *See* 18 U.S.C. §§ 2, 1343, 1349. He contends that the Mandatory Victims Restitution Act ("MVRA") does not authorize restitution for the legal, expert, and consulting fees incurred by the victim-lender,

* This opinion is being entered by a quorum of this court pursuant to 28 U.S.C. § 46(d).

General Electric Capital Corporation ("GECC"), in investigating the fraud or its legal fees from the bankruptcy proceedings caused by the fraud. Because the restitution ordered in this case is consistent with payments upheld in our past cases, we affirm.

## I.

### A

The legality of a restitution award is reviewed de novo. *United States v. Espinoza*, 677 F.3d 730, 732 (5th Cir. 2012). The MVRA instructs a sentencing court to order restitution for a victim's "actual loss directly and proximately caused by the defendant's offense of conviction." *United States v. Sharma*, 703 F.3d 318, 323 (5th Cir. 2012); 18 U.S.C. § 3663A(a)(2). This includes "lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A(b)(4).

According to Lagos, the forensic expert fees, legal fees, and consulting fees incurred by GECC should not have been included because they are "consequential damages." His reliance on *United States v. Schinnell*, 80 F.3d 1064, 1070 (5th Cir. 1996), however, is misplaced because the basis for the restitution award in that case was the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663(b)(1), not § 3663A(b)(4) and the MVRA.

In our Circuit, the scope of restitution under subsection 3663A(b)(4) is controlled by *United States v. Phillips*, 477 F.3d 215 (5th Cir. 2007). In upholding an award of restitution to the University of Texas imposed on a computer hacker, this Court in *Phillips* cited § 3663A(b)(4), which authorizes restitution of expenses

incurred while participating in the investigation or prosecution of the offense. 477 F.3d at 224. It concluded that the University of Texas "was a victim, and it collaborated with the investigation and incurred costs to notify other victims of [the hacker's] data theft in order to determine whether they had suffered further damage." *Id.* As the Court explained, while "consequential damages" are not properly recoverable under *Schinnell*, that case did not involve the application of § 3663A(b)(4). *Id.* In distinguishing *Schinnell*, this Court gave a broad reading to § 3663A(b)(4), allowing not only the cost of the investigation but also the cost of contacting those whose information was compromised to be included in the restitution award.[1]

In unpublished decisions following *Phillips*, this Court has upheld restitution awards that encompassed attorneys' fees and other expenses stemming from the investigation and prosecution of the offense. *United States v. Herrera*, 606 F. App'x 748, 752–53 (5th Cir. 2015) (per curiam) (affirming investigative audit costs as part of restitution where investigative audit was a fundamental component of investigation of defendant's theft of federal funds); *United States v. Dwyer*, 275 F. App'x 269, 271–72 (5th Cir. 2008) (affirming in the restitution award costs of margin calls, attorneys' fees, and accounting fees arising from defendant's bank fraud under plain error standard of review).

---

[1] Notably, the opinion in *Phillips* provided a second reason for upholding the award: the hacker violated the Computer Fraud and Abuse Act ("CFAA"), which contains its own definition of "loss" that encompasses the "cost of responding to an offense." 477 F.3d at 224–25. However, the unpublished decisions that have followed *Phillips* did not arise from convictions under the CFAA.

Lagos admitted that for two years, he and his co-conspirators misled GECC about the value of their accounts receivable to induce GECC to increase the amount of the revolving loan and to provide him and his co-defendants with uncollateralized funds. Their wire fraud scheme caused GECC to employ forensic experts to secure and preserve electronic data as well as lawyers and consultants to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud. Fees incurred by GECC during the investigation of the fraud were necessary and compensable in the restitution award. *See* 18 U.S.C. § 3663A(b)(4).

Likewise, the district court correctly included GECC's legal fees incurred in the related bankruptcy proceedings in the restitution award under subsections 3663A(a)(2) and (b)(4). In its victim impact statements, GECC described how the defendants' fraudulent scheme directly caused the defendants' companies (the GECC borrowers) to file for bankruptcy. The bankruptcy court ordered GECC to continue to make advances to the defendants' companies during the bankruptcy proceedings. Thus, the district court correctly determined that the legal fees incurred by GECC during the related bankruptcy proceedings were directly caused by the defendants' fraud for purposes of restitution. *See* 18 U.S.C. § 3663A(a)(2), (b)(4); *Sharma*, 703 F.3d at 323 (authorizing restitution for losses "directly and proximately caused by the defendant's offense[s] of conviction").

We note that the D.C. Circuit takes a narrower view of restitution under subsection 3663A(b)(4). *United*

*States v. Papagno*, 639 F.3d 1093 (D.C. Cir. 2011).[2] Whatever the merits of the contrary reasoning in *Papagno*, this panel is bound by this Court's prior decision in *Phillips* and will follow it here.

**B**

In the alternative, Lagos argues that even if the MVRA authorizes restitution for GECC's legal, expert, and consulting fees, the district court improperly relied upon unsigned, unverified victim-impact statements submitted by GECC to calculate the restitution award. But Lagos never challenged the fee amounts alleged in the victim-impact statements on these grounds. The district court was entitled to rely on the unrebutted victim-impact statements to support the restitution award. *See Sharma*, 703 F.3d at 324 n.21. GECC submitted to the district court an accounting of the names of the law firms and consultants retained and the nature of the work performed in support of its investigative fees and its fees incurred from the bankruptcy proceedings directly caused by Lagos's wire fraud scheme. Lagos's claim that the district court failed to subject the victim-impact statements to the appropriate level of scrutiny is without merit.

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[2] This restrictive reading, however, is unique among the circuits, several of which have come to the opposite conclusion, although without the benefit of *Papagno*'s reasoning regarding internal investigations. *See United States v. Elson*, 577 F.3d 713, 726–29 (6th Cir. 2009); *United States v. Hosking*, 567 F.3d 329, 331–32 (7th Cir. 2009); *United States v. Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009); *United States v. Amato*, 540 F.3d 153, 159–63 (2d Cir. 2008); *United States v. Gordon*, 393 F.3d 1044, 1056–57 (9th Cir. 2004); *see also United States v. Gupta*, 925 F. Supp. 2d 581, 584 (S.D.N.Y. 2013).

## II.

Finally, the Government urges the court to remand this case for the district court to correct a mathematical error in the restitution total. The district court adopted a restitution total of $15,970,517.37, an amount urged by the Government at sentencing, but the restitution amount supported by the itemization in the victim-impact statements is actually $104.62 lower than the amount imposed by the district court. Lagos does not address the issue at all, and, as stated, he never challenged the specific fee amounts listed in the victim-impact statements before the district court. While this court requires that every dollar included in a restitution award be supported by record evidence, *see Sharma*, 703 F.3d at 323, by failing to challenge the fee amounts before the district court or here, Lagos has waived the issue, *see United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010).

* * *

Based on the foregoing, the judgment of the district court is AFFIRMED.

STEPHEN A. HIGGINSON, Circuit Judge, concurring:

I join Judge Prado's opinion and write separately only to suggest that we may be interpreting Section 3663A(b)(4) too broadly.

As always, statutory interpretation begins "with the plain language and structure of the statute." *Coserv Ltd. Liab. Corp. v. Sw. Bell Tel. Co.*, 350 F.3d 482, 486 (5th Cir. 2003). I agree with the D.C. Circuit's persuasive interpretation of the statutory terms "participation" and "necessary" in *Papagno*, *see* 639 F.3d at 1098–1101, and specifically, that "participating" in a government investigation

does not embrace an internal investigation, "at least one that has not been required or requested by criminal investigators or prosecutors." *Id.* at 1098–99.

I think three additional points support the D.C. Circuit's narrow reading of the statute. First, the *noscitur a sociis* canon of statutory interpretation suggests a narrow reading of the phrase "participation in the investigation . . . of the offense." The *noscitur a sociis* canon provides that "a word is known by the company it keeps[.]" *Yates v. United States*, 135 S.Ct. 1074, 1085 (2015); *see also United States v. Williams*, 553 U.S. 285, 294 (2008). Section 3663A(b)(4) contains a list enumerating the types of conduct allowing for reimbursement. It provides that reimbursement is available for certain expenses "incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A. The statute therefore allows reimbursement for expenses incurred in the course of three types of conduct: (1) participation in the investigation of the offense, (2) participation in the prosecution of the offense, and (3) attendance at proceedings related to the offense. Both participation in the prosecution of the offense and attendance at proceedings related to the offense must take place within the context of the government's criminal enforcement. The question is whether participation in the investigation of the offense is also limited to the government's criminal enforcement. The *noscitur a sociis* canon suggests to me that it is.

Second, a broad reading of Section 3663A(b)(4) is difficult to administer. Indeed, the courts that read Section 3663A(b)(4) to allow recovery of fees incurred during an internal investigation are divided over what, if anything, limits the reach of "other expenses." For example, the

Ninth Circuit allows recovery for "investigation costs—including attorneys' fees—incurred by private parties as a 'direct and foreseeable result' of the defendant's wrongful conduct." *United States v. Gordon*, 393 F.3d 1044, 1057 (9th Cir. 2004). The Second Circuit has questioned this approach, noting that the statute "seems to focus more on the link between these expenses and the victim's participation in the investigation and prosecution than on the offense itself." *Amato*, 540 F.3d at 162.

Even if agreement could be reached on a limiting principle in theory, a broad view of Section 3663A(b)(4) requires district courts to undertake difficult analyses to determine which investigation costs were "necessary" to "the investigation." *See, e.g.*, *United States v. Waknine*, 543 F.3d 546, 559 (9th Cir. 2008) (remanding a case to the district court to consider more thoroughly whether investigation expenses were reasonably necessary). I do not envy district courts faced with this task. To begin, it will often be difficult to determine the scope of "the investigation." For example, imagine that a hospital discovers that its drug inventory is vanishing. Hoping to prevent further losses, the hospital launches a full internal investigation. During the course of the hospital's investigation, it discovers that an employee is stealing drugs. The hospital fires the employee and turns over the evidence it uncovered to the federal prosecutors. The prosecutors had never heard of the employee before and had not been investigating the theft. Nonetheless, charges are eventually brought and the employee is convicted of possession with intent to distribute narcotics. The hospital seeks restitution for its investigation costs. Did the hospital participate in the investigation even though the federal prose-

cutors were not investigating at all when the hospital conducted its internal investigation? And the hypotheticals can get more difficult. Imagine that, unbeknownst to the hospital, federal prosecutors were investigating a string of drug sales at the time the hospital's internal investigation began. However, the prosecutors still had no reason to suspect the employee of being the drug supplier, and accordingly, had no reason to subpoena the hospital to aid in the investigation. Nonetheless, when the hospital turns over the results of its internal investigation, the prosecutors realize that they can link the employee's thefts to the string of drug sales. The employee is prosecuted for and convicted of drug sales. Can the hospital recover its investigation costs because it provided key evidence to an ongoing investigation even though it was never asked to do so? One more example. Imagine that the hospital has insurance that covers employee theft. The hospital's legal department drafts and files a claim with its insurance provider to recover the value of the stolen drugs. At the employee's trial, the government introduces the claim form as evidence of the breadth of the drug conspiracy. Can the hospital recover the entire cost of filing the insurance claim?

And even if the district judge can determine the scope of the investigation, he or she still must determine which expenses were "necessary." I recognize that this question is more familiar to district courts, who are often tasked with calculating attorneys' fees. But familiarity does not make the task easier. *See, e.g.*, Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237, 262 (1986) ("[D]istrict judges find it difficult, indeed, in most instances, impossible, to police [hours and rates of attorneys] by looking over the shoulders of lawyers to monitor the way they handle their cases. To impose that

obligation on the Bench is unrealistic, unduly time-consuming, and typically will amount to little more than an exercise in hindsight."); Hon. John F. Grady, *Reasonable Fees: A Suggested Value-Based Analysis for Judges*, 184 F.R.D. 131, 131 (1999) ("Most federal district judges would agree that the determination of reasonable attorneys' fees is among the most challenging tasks they are called upon to perform."). Moreover, I think that the necessity inquiry is likely to be even more difficult than usual in the context of Section 3663(A)(b)(4). Usually, a district judge evaluating a fee request has overseen the entirety of the litigation subject to the dispute and therefore can decide on their own experience which expenses were reasonable and necessary. Not so under a broad reading of Section 3663(A)(b)(4). Instead, the district court will have only seen the criminal prosecution that ends the Government's investigation. Of course, Congress is free to require, and wise policy may dictate, that courts answer difficult questions. But I am uncomfortable requiring sentencing judges to undertake challenging restitution calculations when, in my view, the statute does not require the inquiry.

Third, and finally, limiting the reach of Section 3663A(b)(4) does not prevent victims from fully recovering their losses. Preliminarily, there are a number of other more explicit and specific criminal restitution provisions that may allow for recovery. For example, Section 3663A(b)(1) allows for victims of property offenses to recover the value of their lost property. Likewise, in the context of identity theft crimes, Congress allows for victims to recover investigation costs unrelated to any government request. *See Papagno*, 639 F.3d at 1099–100; 18

U.S.C. § 3663(b)(6). And where criminal restitution statutes fall short, victims may bring their own civil actions to recover their losses.

## APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Case No. 4:13CR00554-001
USM No. 51568-379

UNITED STATES OF AMERICA

v.

SERGIO FERNANDO LAGOS

Entered: February 18, 2016

**JUDGMENT IN A CRIMINAL CASE**

KENNETH M. HOYT, United States District Judge.

☐ See Additional Aliases. Dan Lamar Cogdell
Defendant's Attorney

**THE DEFENDANT:**

☒ pleaded guilty to count(s) 1-6 on January 20, 2015.

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. §§ 1349 and 1343 | Conspiracy to commit wire fraud | 01/31/2010 | 1 |
| 18 U.S.C. §§ 1343 and 2 | Wire fraud, aiding and abetting | 09/08/2008 | 2 |
| 18 U.S.C. §§ 1343 and 2 | Wire fraud, aiding and abetting | 09/02/2009 | 3 |
| 18 U.S.C. §§ 1343 and 2 | Wire fraud, aiding and abetting | 10/02/2009 | 4 |

☒ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the .

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

February 8, 2016
Date of Imposition of Judgment

/s/ Kenneth M. Hoyt
Signature of Judge

**KENNETH M. HOYT**
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

02.18.16
Date

DEFENDANT: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

**ADDITIONAL COUNTS OF CONVICTION**

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. §§ 1343 and 2 | Wire fraud, aiding and abetting | 11/02/2009 | 5 |
| 18 U.S.C. §§ 1343 and 2 | Wire fraud, aiding and abetting | 11/02/2009 | 6 |

☐ See Additional Counts of Conviction.

DEFENDANT: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 97 months.
This term consists of NINTEY-SEVEN (97) MONTHS as to each of Counts 1-6, to run concurrently, for a total of NINETY-SEVEN (97) Months.

☐ See Additional Imprisonment Terms.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a facility as close to McAllen, Texas, as possible.

☐ The defendant is remanded to the custody of the United States Marshal.

☒ The defendant shall surrender to the United States Marshal for this district:

☒ at 2:00 ☐ a.m. ☒ p.m. on 03/08/2016.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.
This terms consists of THREE (3) YEARS as to each of Counts 1-6.

☐ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. *(for offenses committed on or after September 13, 1994)*

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state registration in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

## SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation officer access to any requested financial information. If a fine or restitution amount has been imposed, the defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer.

The defendant is prohibited from possessing a credit access device, such as a credit card, unless first authorized by the probation officer.

☐ See Additional Special Conditions of Supervision.

DEFENDANT: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| **TOTALS** | $600.00 | | $15,970,517.37 |

A $100 special assessment is ordered as to each of Counts 1-6, for a total of $600.

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

| Name of Payee | Total Loss* | Restitution Ordered | Priority or Percentage |
|---|---|---|---|
| BMO Harris Bank N.A. | | $15,970,517.37 | |

☐ See Additional Restitution Payees.

| TOTALS | $0.00 | $15,970,517.37 |
|---|---|---|

☐ Restitution amount ordered pursuant to plea agreement $ _____

☒ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $600.00 due immediately, balance due

☐ not later than _____, or

☒ in accordance with ☐ C, ☒ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or

D ☒ Payment in equal monthly installments of $1,000 over a period of 34, to commence 60 days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court, Attn: Finance, P.O. Box 61010, Houston, TX 77208

The defendant's restitution obligation shall not be affected by any payments thatay be made by other

defendants in this case, except that no further payment shall be required after the sum of the amounts paid by all defendants has fully covered all the compensable losses.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

| **Case Number Defendant and Co-Defendant Names (including defcndant number)** | **Total Amount** | **Joint and Several Amount** | **Corresponding Payee, if appropriate** |
|---|---|---|---|
| Sergio Fernando Lagos 4:13CR00554-001 | $15,970,517.37 | $15,970,517.37 | |
| Aurelio Jim Aleman-Longoria 4:13CR00554-002 | $15,970,517.37 | $15,970,517.37 | |
| Oscar Cano Barbosa 4:13CR00554-003 | $15,970,517.37 | $15,970,517.37 | |

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

## APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

No. 4:13-CR-00554

UNITED STATES OF AMERICA

v.

SERGIO FERNANDO LAGOS, AURELIO JIM ALEMAN-LONGORIA, AND OSCAR CANO BARBOSA

February 8, 2016
10:00 A.M.

Excerpts from
Transcript of Sentencing of Lagos
Before the Honorable Kenneth M. Hoyt,
United States District Judge

**ORAL RULING REGARDING RESTITUTION**

HOYT, United States District Judge.

* * *

[10]

THE COURT: * * * Let me turn then to the objections of the defendant, and I believe one of these has probably been addressed already. And it goes to the amount

of the loss. And the amount of the loss, as I understand it, has been determined based in part upon what the victim has indicated to be the loss, and that's somewhere in the range of 11,200,000 -- let's see. The loss excluding, I gather, any attorneys' fees or other requests that have been made. Right?

MR. HESTER: Right, Your Honor.

THE COURT: And that would be $11,266,000. Is that right?

MR. HESTER: I think that is pretty close. I have $11,074,047.

THE COURT: That's what you show in the report, but how -- if you add in the attorneys' fees and other investigative costs that the government, I believe, has alleged has occurred in this case, would that bring you to that 11,266,000 or 15,970?

MR. HESTER: I believe that's an issue for restitution, whether GE should be compensated for the various fees they spent in the bankruptcy proceeding, but --

[11] THE COURT: I get that.

MR. HESTER: Yes, Your Honor.

THE COURT: And certainly the argument -- I'm looking at page two of the restitution. I believe these are characterized -- for the record, what is your name?

MR. HESTER: Dennis Hester.

THE COURT: Okay. I'm just making sure the court reporter gets that right.

I'm trying to make sure -- if you look at page two, do you have a copy of the PSR, the probation office's layout of expenses and/or restitution claims?

MR. HESTER: Of the additional PSR?

THE COURT: Excuse me. I'm running fast, but something caught me over the weekend. I apologize.

You are looking at page two?

MR. HESTER: Yes, Your Honor.

THE COURT: $11,074,047.64, quote, actual loss. That's your number, as well?

The remainder of those, I believe, are legal fees, investigative fees, legal fees and consulting fees, that's what you are claiming should or should not be – I gather should not be included in the restitution order, but if those are added, it does come to the 15,970,517.37, correct?

MR. HESTER: Yes. That's an issue as to restitution, but I think we all agree that those should not be included in [12] the 2.B1.1 loss calculation.

THE COURT: Right. I understand that. I understand that part. I'm just trying to make sure that -- yeah, because the loss -- I don't know if it makes a difference though because the loss is what, 9 million to 25 million?

MR. HESTER: Right.

THE COURT: So I don't know if it makes a difference, but I understand your argument. But in terms of the mathematics of it, I'm looking at what you have seen and do not disagree with it in terms of the mathematical side of it. You may disagree with whether it should be

even a part of the adjustment, but in terms of the numbers, you don't disagree that these are the numbers that have been proffered, correct?

MR. HESTER: Correct, Your Honor.

THE COURT: Okay. So back to my comment, and my comment was that I believe the amount of loss that should be offset and/or calculated has been -- is no longer in dispute and that part of your objection has been handled?

MR. HESTER: Yes, it has.

THE COURT: The actual loss?

MR. HESTER: Yes.

THE COURT: Okay. There we are on the same page.

All right. Then as it relates to -- I believe there is an objection that goes to paragraph number two -- I'm sorry. This is objection number two. Objection number two, I [13] believe, argues that GE's loss of 11 million does not discount or explain what part of the amount is derived from interest, late charges, et cetera. Is that still a part of your argument?

MR. HESTER: Your Honor, originally, it wasn't, but in preparing for this hearing over the weekend, I was looking at the victim impact statement. And in the first victim impact statement, it looks like they are trying to get about 4.3 million in fees that the bankruptcy court ordered GE to continue paying throughout the pendency of the first bankruptcy case. And because loss can't include the late fees or penalties --

THE COURT: Can or cannot?

MR. HESTER: Cannot, Your Honor. Our argument would be that that 4.3 million needs to be reduced from

the 11 million loss amount so that we are not including penalties and like costs.

THE COURT: Well, I thought we were already at a point where we agree on 11 million as being the actual loss, principal -- unsecured principal balance owing, and that the 4.3 million would be on top of that. That would take it to this $15 million number?

MR. HESTER: I don't think that's how the victim impact statement reads, Your Honor. I think they started with $41 million in loss, 41.5. Then they go up to 45.7 when the [14] bankruptcy is concluded. And then, at least the way I read this, at the end of the bankruptcy, they are left with 11 --

THE COURT: What page are you reading from? Are you reading from the second page?

MR. HESTER: Can I use the Elmo, Your Honor?

THE COURT: Yes. Let's see what we've got here, if we can get it on. It doesn't come up as quickly as we would like. Hold on one second. I'm trying to get it on my screen here.

*(Pause)*

THE COURT: What page are you on of the report itself? Page one?

MR. HESTER: I'm looking at the victim impact statement.

THE COURT: Yeah. Page one?

MR. HESTER: Yes, sir.

THE COURT: Go ahead.

MR. HESTER: What it looks like to me is as of February 2nd, 2010, the borrowers -- I think that includes not just USA Dry Van but other debtor entities in the bankruptcy proceeding.

THE COURT: Right. These would be the corporate package and subsidiaries?

MR. HESTER: Yes, Your Honor.

THE COURT: Go ahead.

MR. HESTER: Which includes USA Dry Van.

[15] THE COURT: Right.

MR. HESTER: OGE Capital, 41.5 million. And then throughout the bankruptcy proceeding, the Court orders -- they're consistent with orders entered by the bankruptcy court. GE made advances to debtors during the bankruptcy case.

THE COURT: Correct.

MR. HESTER: So it looks like they made about $4.3 million in additional advances.

THE COURT: During the course of the bankruptcy proceeding?

MR. HESTER: Yes, Your Honor.

THE COURT: And these were advances required or at least dictated by the bankruptcy court?

MR. HESTER: That's right.

THE COURT: Okay.

MR. HESTER: And that's our issue right there is that those costs are akin to penalties and like fees that

under Comment Note 3D1 should not -- to 2B1.1, should not be included in a loss calculation.

THE COURT: All right. So where are you then? If you exclude those, where does that place you?

MR. HESTER: We would need to reduce the current loss amount of 11 million by 4.3.

THE COURT: So the $11 million number -- I'm looking at the last page here. The 2.584 million and $2.311 million, [16] these are consulting fees, interest? And those are different than what you are calling these other claims, this 4.3 million?

MR. HESTER: I think the 4.3 million is included in this 11.7.

THE COURT: Last sentence on the bottom of the first page says: GECC received $4.543 million from the disposition of tractors, trailers and finance, et cetera, et cetera. Those are just credits going back.

MR. HESTER: Yes.

THE COURT: That's not the money you are talking about? You are talking about an amount of money that is not clearly reflected in this letter?

MR. HESTER: That's right.

THE COURT: Okay.

MR. HESTER: And I'm getting there by -- this may be helpful to the Court; it was helpful to me. But starting out on February 2nd, 2010, GE is owed 41.5 million. During the bankruptcy from February 2nd to December 28 --

THE COURT: -- advances of $4.3 million were made.

MR. HESTER: That's right.

THE COURT: Pursuant to court order apparently.

MR. HESTER: Correct.

THE COURT: And then?

MR. HESTER: So by the end of the bankruptcy, they owe 45.8. Then by October 28, when everything is said and [17] done, GE is still owed 11.8 million.

THE COURT: And that -- what you are saying includes the 4.3 million that was ordered by the Court as continuing -- as a continuing obligation?

MR. HESTER: Yes, Your Honor.

THE COURT: And the government is shaking --

MS. MACDONALD: That's where we disagree, Your Honor.

THE COURT: Well, it should not be a disagreement. These are numbers. These are easy. We should know if the Court ordered this to be paid and if they were paid.

MS. MACDONALD: The 11 million and change is the actual loss that GE is owed as of today. That's the amount of money that they loaned the defendants that they didn't get back, and it's not secured by anything.

The 4 million has to do with all these other miscellaneous expenses they occurred in investigating the fraud and representing their interests throughout two elaborate bankruptcy proceedings.

The defense has filed -- in multiple filings, they have conceded that. They do not dispute that the loss in this case for sentencing guideline purposes is that $11 million

figure. So, frankly, I'm surprised that the defense is urging these things today. I know that Mr. Hester had an hour-long conference call with the victims, even on Friday, where they explained how they came to these figures. He explained his [18] position, and they explained to him that he was wrong in his interpretation. And that's why they have traveled here today from Connecticut. In case there are any questions about the restitution amounts, they can explain that for the Court.

THE COURT: So the 11.074, let's call it, million dollars, more or less, with the $4.3 million number comes to the 15, I gather, what the government would argue is that that's the $15.970 million that is reflected in the second addendum or second revised report from the PSR?

MS. MACDONALD: Yes, Your Honor. That's the amount we would be seeking for restitution, the $15 million. But for loss purposes, we are only urging the Court to find the $11 million figure which the defense has conceded.

THE COURT: Do I have -- and here is my -- I don't know if it makes any difference in terms of sentencing because I think if I accept your argument, which is that this issue of this 11.4 million has been resolved, then it doesn't matter whether or not I order all of this or not from the point of view of whether GE gets its money back.

The question primarily is whether or not I can order restitution based upon -- additional restitution based upon court expenses and claims of attorneys' fees that I gather have been tested but maybe, maybe not, by the defendant.

MS. MACDONALD: Right.

THE COURT: In other words, these were numbers that [19] were calculated and ordered by the bankruptcy court.

MS. MACDONALD: Some of them were.

THE COURT: Yeah. And they may or may not have been challenged by the defendant because he is not in a position to challenge them. Or he did challenge them or he did not and, therefore, they are fixed. So the question is whether or not this should be included in the restitution, irrespective as to whether or not it should be -- whether or not he should have to pay it.

Where is the government on that?

MS. MACDONALD: Exactly. I think the Court has precisely pinpointed the legal issue. Should, as a matter of law, the victims get compensation for the money that they had to spend to fix this mess or problem that was created by the defendants? And the Fifth Circuit case law says that they can. And as a matter of justice, I suggest, Judge, they should.

If someone gets assaulted and they have broken bones and they have to go to a hospital and pay for a doctor and pay for physical therapy, should they be out of that money or should the person that assaulted them pay that money?

THE COURT: Well, it goes beyond that. Here is where it goes to. It goes to not just simply reimbursing them for the damages and the expenses of the injury itself.

What you are suggesting is that because they had to bring a lawsuit to get compensated, to get the compensation [20] for the injuries, et cetera, they should be able to

get money, not just for the injuries but also for the effort to collect the money for the injuries.

MS. MACDONALD: Exactly. And the Fifth Circuit has endorsed that, Your Honor.

THE COURT: All right.

MS. MACDONALD: And they didn't just spend money on attorneys' fees. As the victims will explain, if the Court permits them to address Your Honor later, they had to spend a massive amount of manpower and money just to investigate their fraud. They hired a computer imaging corporation, Stroz Friedberg, to copy all the computers to preserve evidence because they were dealing with a situation where they had been lied to by defendants for over two years. People had been creating fake documents and destroying –

THE COURT: I get that. I'm not there. I'm way from there. I'm just trying to figure out and make sure of two things. Number one, did I understand counsel's argument as to what the -- what constitutes restitution and then how do we define restitution? That's where I am.

There is no dispute that I see raised as to the numbers. The dispute is as to whether or not they should fit into the categories that they have been placed in.

That's your objection number two, I believe, and that goes to whether or not interest and late charges should [21] be – not included in the restitution order – I mean, the actual loss order, but whether they should be included in a restitution order.

MS. MACDONALD: Judge, I would say we are not seeking any money back in terms of interest or penalties. I agree with the defense on that.

THE COURT: Yeah. Well, whatever the number constitutes, I think that I have defined it appropriately. So I'm going to overrule the objection number two.

And the Court is going to therefore find that the actual loss incurred by the victim is $11,074,047.04 for purposes of the sentencing guideline calculations. That the 4.3 million that is placed on top of that, making the number come to $15,970,517.37, while that might be funds that were put into the company to -- for an ongoing business, and the ongoing business in solving the debt situation during the bankruptcy and/or legal fees, I would find that that is appropriately due and owing as part of the court restitution in the case. So the numbers don't change in that respect so that objection is overruled.

* * *

[67]

THE COURT: * * * And the Court is of the opinion that while the $11 million figure represents the amount of loss, the number $15,970,517.35 represents not just loss but damages incurred in overturning and discovering the loss and those moneys should be added in -- an additional 4.3 million should be added into the restitution order, making it the $15 million figure that the Court just stated.

* * * * *

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20146

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

SERGIO FERNANDO LAGOS, Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

Filed: March 17, 2017

Before: PRADO and HIGGINSON, Circuit Judges.*

**JUDGMENT**

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

STEPHEN A. HIGGINSON, Circuit Judge, concurring.

* This opinion is being entered by a quorum of this court pursuant to 28 U.S.C. § 46(d).

## APPENDIX E

18 U.S.C. 3663A provides:

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psycho-

logical care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--

(A) that is--

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances

Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

No. 16-1519

# In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether the district court erred in ordering restitution for internal investigation expenses and attorney's fees that were caused by petitioner's fraud offenses.

## TABLE OF CONTENTS

Page

Opinion below ..... 1
Jurisdiction ..... 1
Statement ..... 1
Argument ..... 6
Conclusion ..... 14

## TABLE OF AUTHORITIES

Cases:

*Dolan* v. *United States*, 560 U.S. 605 (2010) ..... 8, 11
*United States* v. *Amato*, 540 F.3d 153 (2d Cir. 2008), cert. denied, 556 U.S. 1138 (2009) ..... 9
*United States* v. *Elson*, 577 F.3d 713 (6th Cir. 2009) ..... 8, 13
*United States* v. *Fair*, 699 F.3d 508 (D.C. Cir. 2012) ..... 14
*United States* v. *Hosking*, 567 F.3d 329 (7th Cir. 2009) ..... 8, 11, 13
*United States* v. *Janosko*, 642 F.3d 40 (1st Cir. 2011) ..... 8
*United States* v. *Maynard*, 743 F.3d 374 (2d Cir. 2014) ..... 12
*United States* v. *Nosal*, 844 F.3d 1024 (9th Cir. 2016), cert. denied, No. 16-1344, 2017 WL 1807382 (Oct. 10, 2017) ..... 8
*United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011) ..... 6, 9, 10, 11, 12
*United States* v. *Phillips*, 477 F.3d 215 (5th Cir.), cert. denied, 552 U.S. 820 (2007) ..... 9
*United States* v. *Scott*, 405 F.3d 615 (7th Cir. 2005) ..... 13
*United States* v. *Stennis-Williams*, 557 F.3d 927 (8th Cir. 2009) ..... 9

Statutes: Page

Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A (§ 201 *et seq.*), 110 Stat. 1227 ..... 3
18 U.S.C. 3663A ..... 3, 14
18 U.S.C. 3663A(a)(1) ..... 4
18 U.S.C. 3663A(a)(2) ..... 4, 8
18 U.S.C. 3633A(b)(1) ..... 4, 6, 7, 12, 13, 14
18 U.S.C. 3663A(b)(4) ..... *passim*
18 U.S.C. 3663A(c)(1)(A)(ii) ..... 4
18 U.S.C. 1343 ..... 1
18 U.S.C. 1349 ..... 1

Miscellaneous:

S. Rep. No. 179, 104th Cong., 1st Sess. (1995) ..... 7

# In the Supreme Court of the United States

No. 16-1519

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 864 F.3d 320.

## JURISDICTION

The judgment of the court of appeals was entered on March 17, 2017. The petition for a writ of certiorari was filed on June 15, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349, and five counts of wire fraud, in violation of 18 U.S.C. 1343. C.A. ROA 170-171. The district court sentenced petitioner to 97 months of imprisonment, to be followed by three years

of supervised release, and ordered $15,970,517 in restitution. *Id.* at 172-173, 175. The court of appeals affirmed. Pet. App. 1a-11a.

1. Petitioner was the owner and CEO of a holding company that owned USA Dry Van Logistics LLC (Dry Van).[1] C.A. ROA 353. Petitioner and his associate, Aurelio Aleman-Longoria, entered into a revolving-loan finance agreement on behalf of Dry Van with General Electric Capital Corporation (GECC). *Ibid.* The agreement required Dry Van to use all proceeds from the loan for business purposes and to notify GECC of any material changes in its financial affairs. *Ibid.* The loan was secured by Dry Van's accounts receivable, and Dry Van was required to submit "Borrowing Base Certificates" to justify advances on the line of credit. *Ibid.* The credit line varied based on Dry Van's eligible accounts receivable, which consisted of accounts that were less than 90 days old. *Ibid.* In May 2003, Dry Van obtained an initial line of credit of between $2 million and $3 million. *Id.* at 354. The line of credit eventually increased to $35 million by October 2009. *Ibid.*

From early 2008 through early 2010, petitioner, Aleman-Longoria, and Dry Van's controller defrauded GECC by making false representations regarding Dry Van's accounts receivable. C.A. ROA 354. The fraud took several forms. First, petitioner and his confederates booked fake sales to create fictitious accounts receivable, which they then used to expand their credit with GECC. *Id.* at 242, 355. Second, they transferred loan proceeds into a lockbox account in Chicago, Illinois and used those funds to make payments on the fictitious

---

[1] This brief will use "Dry Van" to refer to USA Dry Van Logistics LLC, its holding company, and the holding company's other subsidiaries.

accounts receivable, giving the false impression that customers were paying on those accounts. *Ibid.* Third, they "re-ag[ed]" accounts to make them appear that they had been created more recently, thereby making the accounts "eligible" for use as collateral. *Id.* at 355. The end result was that approximately $26.726 million of Dry Van's $37.266 million in accounts receivable were fraudulent. *Ibid.*

Petitioner and Aleman-Longoria eventually admitted to an outside consultant that they had committed fraud. C.A. ROA 358. On January 25, 2010, they disclosed the fraud to GECC, and Dry Van declared bankruptcy the following week. *Ibid.* Even after admitting the fraud and declaring bankruptcy, however, petitioner and Aleman-Longoria continued to take money from Dry Van for their own use. *Ibid.*

Shortly thereafter, in March 2010, GECC filed a civil action against petitioner and Aleman-Longoria, which resulted in separate agreed judgments against each of them for over $33.555 million, plus interest. C.A. ROA 359; see Agreed Judgment at 1, *General Elec. Capital Corp.* v. *Lagos*, No. 7:10-cv-77 (S.D. Tex. Aug. 16, 2010) ($33.555 million judgment against petitioner).

2. In 2013, a federal grand jury indicted petitioner on one count of conspiracy to commit wire fraud and five counts of wire fraud. C.A. ROA 13-21. Petitioner subsequently pleaded guilty to all counts without a plea agreement. *Id.* at 7, 352.

a. The Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A (§ 201 *et seq.*), 110 Stat. 1227, specifies procedures for awarding restitution as a mandatory component of the sentence for certain federal criminal offenses. 18 U.S.C. 3663A. The MVRA provides that, when sentencing a

defendant convicted of an offense against property or other specified offenses, the district court "shall order * * * that the defendant make restitution to the victim of the offense," 18 U.S.C. 3663A(a)(1) and (c)(1)(A)(ii), where "'victim'" means any "person directly and proximately harmed as a result of the commission of [the relevant] offense," 18 U.S.C. 3663A(a)(2).

"[I]n the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense," the MVRA provides that the order of restitution "shall require" that the defendant return the property to its owner or, if such return is impossible, impracticable, or inadequate, "pay an amount equal to" the "value of the property" less any part of the property returned. 18 U.S.C. 3663A(b)(1).

The MVRA further provides that, "in any case," the order of restitution shall require the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4).

b. The presentence investigation report recommended a restitution award to GECC for its unrecovered loan principal, which totaled about $11.074 million. C.A. ROA 385; see *id.* at 360, 379, 382. Petitioner did not object to that amount, *id.* at 390-391, and does not now dispute that restitution for that amount was appropriate, Pet. 6 n.2.

The government recommended an additional $4.895 million in restitution to compensate GECC for the forensic expert fees (over $20,000), legal fees (over $1.776 million), and consulting fees (over $2.311 million) that GECC incurred in investigating petitioner's fraud, plus

the legal fees (over $787,000) it expended during Dry Van's bankruptcy proceedings. C.A. ROA 340, 384. Petitioner objected to that additional restitution. *Id.* at 390-391.

The district court sentenced petitioner to 97 months of imprisonment, to be followed by three years of supervised release. C.A. ROA 172-173. The court adopted the government's restitution recommendation and ordered approximately $15.970 million in restitution. *Id.* at 175, 273.

3. The court of appeals affirmed. Pet. App. 1a-11a. As relevant here, the court upheld the district court's restitution award, rejecting petitioner's contention that the award should not have included reimbursement for GECC's "forensic expert fees, legal fees, and consulting fees," *id.* at 2a. See *id.* at 2a-5a.

Section 3663A(b)(4), the court of appeals explained, "authorizes restitution of expenses incurred while participating in the investigation or prosecution of the offense." Pet. App. 2a-3a. That statutory authorization had been held in prior cases to "encompass[] attorneys' fees and other expenses stemming from the investigation and prosecution of the offense." *Id.* at 3a. Consistent with those decisions, the court concluded that the disputed fees incurred by GECC were both "necessary and compensable in the restitution award." *Id.* at 4a.

Petitioner's "wire fraud scheme," the court of appeals explained, "caused GECC to employ forensic experts to secure and preserve electronic data as well as lawyers and consultants to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud." Pet. App. 4a. Similarly, the court

continued, the legal fees that GECC incurred in bankruptcy proceedings "were directly caused by [petitioner's] fraud," because petitioner's "fraudulent scheme directly caused [his and his co-defendant's] companies (the GECC borrowers) to file for bankruptcy" and the bankruptcy court "ordered GECC to continue to make advances to [those] companies during the bankruptcy proceedings." *Ibid.*

The court of appeals observed that the D.C. Circuit had "take[n] a narrower view of restitution under subsection 3663A(b)(4)." Pet. App. 4a-5a (citing *United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011)). That decision, the court observed, was "unique among the circuits" and did not disturb the result in this case. *Id.* at 5a n.2 (citing cases).

b. Judge Higginson concurred. Pet. App. 6a-11a. Judge Higginson concluded that the panel was bound by prior precedent and wrote separately "only to suggest that we may be interpreting Section 3663A(b)(4) too broadly." *Id.* at 6a. Petitioner did not request rehearing en banc.

## ARGUMENT

Petitioner contends that the court of appeals erred in determining that Section 3663A(b)(4) authorizes restitution for the cost of GECC's internal investigations on the ground that the government did not require or request that GECC incur those costs. Pet. 8, 27-29. The court of appeals correctly upheld the restitution award in this case. Other courts of appeals have upheld similar restitution awards under both Section 3663A(b)(1) and Section 3663A(b)(4). No court of appeals has concluded that neither of those provisions authorize such an award. Accordingly, petitioner's assertion of a limited division of authority with respect only to Section

3663A(b)(4) does not reflect a disagreement that would preclude the award of restitution in this case in any court of appeals. Review by this Court is unwarranted.

1. Congress enacted the MVRA in 1996 to provide "full restitution to all identifiable victims of covered offenses," deeming it "essential that the criminal justice system * * * , to the extent possible, ensure that [an] offender be held accountable to repay the[] costs" that his offense imposes "on the victim." S. Rep. No. 179, 104th Cong., 1st Sess. 18 (1995). To that end, multiple provisions within Section 3663A(b) specify mandatory awards of restitution based on the nature of the defendant's offense. Section 3663A(b)(1), for instance, broadly requires restitution, as relevant here, in the case of "an offense resulting in * * * loss * * * of property of a victim of the offense" and requires either return of the property or restitution in an amount equal to its value if its return would be "impossible, impracticable, or inadequate." 18 U.S.C. 3663A(b)(1). Section 3663A(b)(4) additionally contains a catchall provision that applies "in any case" and requires that the court's order of restitution require the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4).

Although Section 3663A(b)(1) and (4) could both independently authorize restitution when the defendant's offense "result[s] in" a victim's loss of property, the court of appeals in this case affirmed the district court's award of restitution under Section 3663A(b)(4). The court of appeals determined that the "loss[es]" that

GECC incurred in its internal investigation into petitioner's fraud and in the ensuing bankruptcy proceedings for petitioner's companies all were losses "directly and proximately caused by [petitioner's] offense." Pet. App. 2a (quoting 18 U.S.C. 3663A(a)(2)); see *id.* at 4a. Petitioner does not dispute that factbound determination. Petitioner instead disputes that the losses qualify under Section 3663A(b)(4) as "necessary" expenses incurred during GECC's "participation in the investigation or prosecution of [petitioner's] offense" and its "attendance at proceedings related to the offense," 18 U.S.C. 3663A(b)(4). See Pet. App. 2a-4a.

The courts of appeals have overwhelmingly rejected petitioner's position. Consistent with the recognition that the MVRA's "substantive purpose" is "to ensure that victims of a crime receive full restitution," *Dolan* v. *United States*, 560 U.S. 605, 612 (2010), all but one of the courts of appeals to have addressed the issue have agreed that Section 3663A(b)(4) requires restitution for attorney's fees and other internal investigation costs that a victim incurs as a result of the defendant's offense. See *United States* v. *Nosal*, 844 F.3d 1024, 1046-1047 (9th Cir. 2016) (internal "investigation costs and attorneys' fees" are recoverable if they are the "'direct and foreseeable result' of the defendant's wrongful conduct") (citation omitted), cert. denied, No. 16-1344, 2017 WL 1807382 (Oct. 10, 2017); *United States* v. *Janosko*, 642 F.3d 40, 42 (1st Cir. 2011) (Souter, J.) (cost of credit monitoring after data breach); *United States* v. *Elson*, 577 F.3d 713, 727-728 (6th Cir. 2009) (attorney's fees incurred in "discovering and investigating" defendant's fraud in attempt to recover lost funds); *United States* v. *Hosking*, 567 F.3d 329, 332 (7th Cir. 2009) (bank's inter-

nal investigation costs); *United States* v. *Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009) (attorney's fees and accountant fees incurred during internal investigation of defendant's fraud); *United States* v. *Amato*, 540 F.3d 153, 159-160 (2d Cir. 2008) (attorney's fees and internal investigation costs), cert. denied, 556 U.S. 1138 (2009); *United States* v. *Phillips*, 477 F.3d 215, 224 (5th Cir.) (costs of internal damage assessment and of contacting other victims of data breach); cert. denied, 552 U.S. 820 (2007). But see *United States* v. *Papagno*, 639 F.3d 1093, 1095 (D.C. Cir. 2011) (holding that internal investigation expenses are not recoverable if the investigation is not required or requested by the government). That conclusion reflects "the plain language of the statute," which "gives the district courts broad authority" to determine when an expense was "necessary" and covers such expenses "'incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.'" *Amato*, 540 F.3d at 160 (quoting 18 U.S.C. 3663A(b)(4)).

2. Petitioner contends (Pet. 10-13, 27-28) that the court of appeals in this case misconstrued Section 3663A(b)(4) and that the D.C. Circuit in *Papagno* correctly read that provision exclude restitution for "an internal investigation that is neither required nor requested by criminal investigators or prosecutors," 639 F.3d at 1095. *Papagno* concluded that such expenses are not "necessary" and do not involve "participation in the investigation or prosecution of the offense" unless the government requires or requests it. *Ibid.* (citation and emphasis omitted). Petitioner's reliance on *Papagno* is misplaced.

In *Papagno*, the parties both assumed that the relevant "investigation" was the government's *criminal* investigation. 639 F.3d at 1097-1098. The statutory text, however, contains no explicit limitation to that effect. Although the text refers to "the investigation," in the singular, 18 U.S.C. 3663A(b)(4), default interpretive principles direct that "words importing the singular include and apply to several persons, parties, or things," 1 U.S.C. 1. In any event, the "investigation * * * of the offense" is not naturally limited solely to federal investigatory activities, but instead includes a broad range of inquiries into a defendant's unlawful conduct. Petitioner would presumably acknowledge, for example, that an initial investigation by state authorities before any federal involvement is anticipated would qualify. And in the absence of any language cabining the provision to public investigations, no basis exists for excluding investigatory activities that, say, crack open the case for presentation to federal authorities on the ground that they were undertaken by the victim rather than the local authorities.

In any event, even assuming that premise, the panel erred in reasoning that a victim does not "participat[e]" in a criminal investigation by merely "assist[ing]" or "aid[ing]" it and must instead actively "take part in" the investigation. *Papagno*, 639 F.3d at 1098 (citation omitted). That narrow construction does not account for the context in which Congress used the term. Section 3663A(b)(4) broadly refers to "participation in the investigation or prosecution of the offense." 18 U.S.C. 3663A(b)(4). A private individual—unlike a government prosecutor of investigator—is not understood as a matter of common parlance ever to "take part in" a criminal investigation or prosecution, except to the extent he

provides his assistance in the investigation or prosecution.

*Papagno*'s view that the "costs of an internal investigation cannot be said to be *necessary* if the investigation was neither required nor requested" by the government, 639 F.3d at 1095 (emphasis added), likewise takes an unduly restrictive approach. In *Hosking*, for instance, the victim "bank's investigation" was necessary to determine "the actual amount embezzled" and was therefore an "important part of 'the investigation . . . of the offense.'" 567 F.3d at 332. Victims in financial crimes not infrequently conduct their own investigations to determine what occurred before alerting and providing their investigatory fruits to authorities. Such an investigation is logically understood to be a "necessary" expense, even if the government (which might be yet unaware of the criminal conduct) has not requested or required it. Indeed, *Papagno*'s restrictive understanding of Section 3663A(b)(4) loses sight of the fact that the MVRA's "purpose" is "to ensure that victims of a crime receive full restitution." *Dolan*, 560 U.S. at 612.

Finally, *Papagno* does not address Section 3663A(b)(4)'s requirement for restitution of expenses incurred during "attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4). That language necessarily encompasses expenses other than those relating specifically to government investigations, and would include, for example, the fraud-induced bankruptcy proceedings that cost GECC a substantial amount of money here.

3. Petitioner asserts (Pet. 23-24) that this Court should grant review because the D.C. Circuit's divergent interpretation of Section 3663A(b)(4) reflects

"real-world differences" that will produce "substantial[ly]" different restitution awards "based solely on whether a defendant was convicted in the District of Columbia or [elsewhere]." Petitioner is incorrect.

The D.C. Circuit in *Papagno* confronted unusual circumstances under which a governmental victim had conducted an expensive internal investigation *after* "almost everything that [the defendant] stole" had been recovered. 639 F.3d at 1095. The D.C. Circuit set aside such restitution, *ibid.*, which might not have been recoverable in other courts of appeals. Cf. *United States* v. *Maynard*, 743 F.3d 374, 381 (2d Cir. 2014) (holding that a bank was not entitled to restitution for the cost of producing wanted posters after a robbery where the police "did not seek the bank's cooperation in postering the neighborhood" and "the bank had no interest to protect by an independent investigatory effort").

*Papagno* based its judgment on its view that Section 3663A(b)(4) does not "authorize restitution for the costs of an organization's internal investigation, at least when * * * the internal investigation was neither required nor requested by the criminal investigators or prosecutors." *Papagno*, 639 F.3d at 1095. That formulation was far broader than was necessary for the panel to resolve the case before it. And the D.C. Circuit has not in the six years since *Papagno* had occasion to determine whether restitution of the sort at issue in this case could be justified under any other statutory authority.

Several other courts of appeals, however, have considered the issue and upheld awards of restitution for internal-investigation costs and attorney's fees under a separate provision of the MVRA, 18 U.S.C. 3663A(b)(1). Section 3663A(b)(1), as relevant here, applies to "an offense *resulting in* * * * loss * * * of property of a victim

of the offense" and requires return of the property or restitution equal to it value if returning such property would be "impossible, impracticable, or inadequate." 18 U.S.C. 3663A(b)(1) (emphasis added). That textually broad authorization, several courts of appeals have held, independently authorizes restitution awards similar to the one in this case. See, *e.g.*, *Elson*, 577 F.3d at 726-728 (holding that attorney's fees incurred because of fraudulent conspiracy were subject to restitution under both Section 3663A(b)(1) and (4)); *Hosking*, 567 F.3d at 332 (holding that bank's expenses investigating the defendant's fraudulent scheme were recoverable under Section 3663A(b)(1) and (4)); *United States* v. *Scott*, 405 F.3d 615, 618-620 (7th Cir. 2005) (holding that fraud offense resulted in victim's internal audit fees and that such fees were recoverable as restitution for a "loss" of property under Section 3663A(b)(1)).

In *Hosking*, for example, the defendant embezzled over $502,000 from a bank. 567 F.3d at 331. The Seventh Circuit reasoned that expenses incurred through the efforts of "the bank's employees and outside professionals in unraveling the twelve-year embezzlement scheme" were recoverable under Section 3663A(b)(1) because they were "a direct and foreseeable result of the defendant's conduct." *Id.* at 332. The same reasoning applies to the disputed portions of the restitution award in this case. As a result, the fact that the court of appeals' precedent required in this case that restitution be awarded under Section 3663A(b)(4) rather than Section 3663A(b)(1) (which it has interpreted more narrowly) was academic. See Pet. App. 2a-5a.

The D.C. Circuit has yet to address whether restitution similar to that in this case could be awarded under Section 3663A(b)(1). Indeed, we have found only one

D.C. Circuit decision that has ever had occasion separately to discuss Section 3663A(b)(1)'s requirements. See *United States* v. *Fair*, 699 F.3d 508, 512 (D.C. Cir. 2012). Furthermore, as petitioner acknowledges (Pet. 15-16), no other court of appeals has concluded that Section 3663A prohibits such restitution awards.

Accordingly, petitioner has failed to demonstrate that any prosecution in any court of appeals would result in any "real-world differences" (Pet. 24) that would lead a court to reject the type of restitution in this case. Because such an award could be justified under either Section 3663A(b)(1) and Section 3663A(b)(4) and because no court has deemed both provisions insufficient to warrant such restitution, petitioner has at the most identified a theoretical possibility for divergent outcomes in different courts, not an actual conflict that would mandate divergent results. Until such a "real world" conflict arises, this Court's review is unwarranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2017

No. 16-1519

# In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER


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## TABLE OF CONTENTS

Page

Reply brief ..... 1
Conclusion ..... 12

## TABLE OF AUTHORITIES

Cases:

*Dolan* v. *United States*, 560 U.S. 605 (2010) ..... 6
*Kucana* v. *Holder*, 558 U.S. 233 (2010) ..... 9
*Rodriguez* v. *United States*, 480 U.S. 522 (1987) ..... 6
*United States* v. *Amato*, 540 F.3d 153 (2d Cir. 2008) ..... 10
*United States* v. *Carpenter*, 841 F.3d 1057 (8th Cir. 2016) ..... 3
*United States* v. *Cuti*, 778 F.3d 83 (2d Cir. 2014) ..... 3
*United States* v. *Elson*, 577 F.3d 713 (6th Cir. 2009) ..... 8
*United States* v. *Hosking*, 567 F.3d 329 (7th Cir. 2009) ..... 8
*United States* v. *Juvenile Female*, 296 F. App'x 547 (9th Cir. 2008) ..... *passim*
*United States* v. *Mullins*, 971 F.3d 1138 (4th Cir. 1992) ..... 10
*United States* v. *Onyiego*, 286 F.3d 249 (5th Cir. 2002) ..... 11
*United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011) ..... *passim*
*United States* v. *Schinnell*, 80 F.3d 1064 (5th Cir. 1996) ..... 11
*United States* v. *Scott*, 405 F.3d 615 (7th Cir. 2005) ..... 8

Statutes:

18 U.S.C. 2259(b)(3)(F) ..... 6

Page

Statutes—continued:

Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, § 204(a), 110 Stat. 1227 ..... *passim*
18 U.S.C. 3663A(b)(1) ..... *passim*
18 U.S.C. 3663A(b)(1)(A) ..... 7
18 U.S.C. 3663A(b)(4) ..... *passim*
Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248 ..... *passim*
18 U.S.C. 3663 ..... 9
18 U.S.C. 3663(b)(1) ..... 9, 11
18 U.S.C. 3663(b)(4) ..... 9
18 U.S.C. 3663(b)(6) ..... 9

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*v.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

As the petition established, the courts of appeals are intractably divided over an important and recurring question of federal criminal law: whether 18 U.S.C. 3663A(b)(4) authorizes restitution for a company's internal investigation and other expenses that were neither required nor requested by the government.

In response, the government effectively concedes that review is warranted. It acknowledges that the circuits are squarely divided over this frequently recurring question. It does not dispute the issue's obvious importance, and it never doubts that this case is an ideal vehicle for resolving the issue.

Instead, the government offers two transparent attempts to avoid review, but each fails. Its primary retort—that the D.C. Circuit misconstrued Section 3663A(b)(4)—is a reason to *grant* review, not deny it. And

even on that front, the government barely recognizes that each of its arguments has been explicitly refuted by Judge Kavanaugh's opinion, Judge Berzon's dissent, or Judge Higginson's concurrence. This sharp disagreement (which the government's brief reaffirms) will not be resolved without this Court's intervention.

Aside from jumping the gun on the merits, the government posits that, at some future point, in some hypothetical case, the D.C. Circuit may theoretically reach a similar result under Section 3663A(b)*(1)*. This is thin gruel. The government again ignores that the D.C. Circuit's operative rationale effectively rejected that outcome; the government's new theory thus would fail just as quickly as its old one. Moreover, the government concedes that multiple circuits already allow these expenses under Section 3663A(b)(4), and thus have no reason to address the government's implausible new argument. There is no excuse for giving the government a free pass to secure restitution under an (incorrect) reading of Section 3663A(b)(4), simply because the D.C. Circuit, inexplicably, could do an about-face, abandon *Papagno*, and adopt the government's (incorrect) reading of Section 3663A(b)(1).

At bottom, on the actual question presented, this case checks off every box for review, and nothing in the government's opposition undermines the urgent need to resolve this significant question. Under the existing split, lower courts will continue awarding substantial restitution without any basis in the statutory text. Review is warranted.

1. As the petition established, the circuit conflict is clear, undeniable, and entrenched. Pet. 10-23. The government does not dispute the existence of a square conflict, nor could it. Br. in Opp. 8, 9. The court of appeals

candidly acknowledged the conflict, which the D.C. Circuit (and multiple other circuits) have readily confirmed. See Pet. App. 4a-5a & n.2; *United States* v. *Papagno*, 639 F.3d 1093, 1101 (D.C. Cir. 2011). There is no debate that these courts have read the same provision in opposite ways, so that the costs of internal investigations and private expenses are included (or not) based on the jurisdiction of the prosecution.

Instead, the government admits that the conflict is real, but says it is "overwhelming[]" in its favor. Br. in Opp. 8. Yet the government does not deny that this Court regularly grants review to decide splits at least as "overwhelming" as this. Pet. 25 (providing multiple examples). And, in fact, the government's case is not nearly as strong as it suggests. Not only does the decision below conflict with *Papagno*'s clear holding, but the same issue has separately divided two other circuits. See Pet. 13-15 (describing Judge Higginson's Fifth Circuit concurrence, Pet. App. 6a-11a, and Judge Berzon's Ninth Circuit dissent, *United States* v. *Juvenile Female*, 296 F. App'x 547, 550-552 (9th Cir. 2008)). The disagreement is thus hardly shallow or isolated; appellate judges on two panels (Judge Berzon and Judge Higginson) have argued that the position in *Papagno* is correct, and other panels have simply acknowledged they are bound by prior circuit authority, despite recognizing *Papagno*'s narrower holding. See, *e.g.*, Pet. App. 5a ("Whatever the merits of the contrary reasoning in *Papagno*, this panel is bound by this Court's prior decision in *Phillips* and will follow it here."); *United States* v. *Carpenter*, 841 F.3d 1057, 1061-1062 (8th Cir. 2016) (describing and rejecting *Papagno*); *United States* v. *Cuti*, 778 F.3d 83, 93, 96 n.5 (2d Cir. 2014) (acknowledging entrenched conflict with *Papagno*); see also Pet. 18-23 & nn.5-7 (outlining the open conflict and lack of movement on either side). The division is thus clear and meaningful,

and the government cannot simply cabin the D.C. Circuit as a lonely outlier.[1]

The government's claim of "overwhelming" support also falls flat aside from mere head-counting. Under any qualitative metric, the minority view is by far the more *developed* view. Indeed, as petitioner explained, Judge Kavanaugh's opinion in *Papagno* treats the issue in greater depth than any other opinion, followed only by Judge Berzon's dissent in *Juvenile Female* and Judge Higginson's separate opinion below. See Pet. 25 (making this point, without response from the government). These three opinions have systematically refuted the cursory views of other courts of appeals (Pet. 27-29), yet four of those circuits (without any meaningful response) have refused to back down (Pet. 18-23). This admitted conflict is thus significant, and this Court alone can ensure that this important criminal statute is applied uniformly nationwide.

2. Rather than contest any aspect of the ordinary certworthiness calculus (including the existence of a square conflict, the issue's importance, its frequent recurrence, or this case's suitability as a vehicle for resolving the split), the government instead offers two marginal responses. Each is insubstantial.[2]

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[1] Indeed, in attempting to minimize the conflict, the government completely ignores Judge Berzon's strong dissent, and brushes past Judge Higginson's (nominal) concurrence, without once grappling with either extended critique of the majority view. See Br. in Opp. iii, 6 (never citing *Juvenile Female*, and referencing, barely, Judge Higginson's opinion in the Statement, but not the Argument).

[2] *E.g.*, Br. in Opp. 6-7, 9, 11 (acknowledging conflict), 11 ("Victims in financial crimes not infrequently conduct their own investigations to determine what occurred before alerting and providing their investigatory fruits to authorities.").

a. First, according to the government, the decision below is correct and *Papagno*'s contrary analysis is wrong. Br. in Opp. 7-11. The fact that the government believes it should win on the merits is hardly a reason to *forgo* review of the merits. Quite the contrary, the sharp disagreement over Section 3663A(b)(4)'s scope only confirms the obvious certworthiness of this case.

Indeed, each core component of the government's merits position can be lined up with a direct *refutation* of that position in *Papagno*'s unanimous opinion, Judge Berzon's dissent, or Judge Higginson's "concurrence" below. Take, for example, the government's belief that "the investigation" in Section 3663A(b)(4) is not limited to *the government's* investigation. Br. in Opp. 10. That view was directly repudiated by *Papagno*, which explained that "the singular 'offense' * * * is of course the criminal offense of conviction," and thus "[t]he singular 'investigation or prosecution' of 'the offense' is * * * the [government's] criminal investigation and prosecution." 639 F.3d at 1097-1098; see also, *e.g.*, *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting) ("it is participation in *the* investigation—the government's investigation—that is subject to restitution, not costs incurred when striking out on one's own").[3]

And the government's understanding of the statutory terms "participation" and "necessary" is self-avowedly at odds with *Papagno*'s reasoning, which the government simply rejects. Br. in Opp. 10-11 (resisting *Papagno*'s contrary analysis); compare Pet. App. 6a-7a (Higginson, J.,

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[3] Nor was this position merely "assumed." Contra Br. in Opp. 10. The panel reached this legal conclusion in the course of carefully examining Section 3663A's text, structure, purpose, and history. 639 F.3d at 1097-1101.

concurring) ("agree[ing] with the D.C. Circuit's persuasive interpretation of the statutory terms 'participation' and 'necessary,'" and "specifically, that 'participating' in a government investigation does not embrace an internal investigation, 'at least one that has not been required or requested by criminal investigators or prosecutors'"; further bolstering the point with "the *noscitur a sociis* canon").[4]

Thus, the minority position may be in the minority, but it represents a clear, exhaustive rejoinder to the government's contrary analysis. And aside from insisting its theory is correct, the government failed to meaningfully engage the detailed analysis of the D.C. Circuit or the dissenting judges on other courts of appeals. This division only underscores the significant "divergen[ce]" (Br. in

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[4] The government argues that *Papagno*'s "restrictive understanding of Section 3663A(b)(4) loses sight" of the MVRA's "'purpose,'" which is "'to ensure that victims of a crime receive full restitution.'" Br. in Opp. 11 (quoting *Dolan* v. *United States*, 560 U.S. 605, 612 (2010)). But "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). Congress's purpose is ultimately reflected in the actual text. And if Congress truly meant to "ensure" that crime victims receive "full restitution," it would have written a simple, general statute that says exactly that—as opposed to a carefully delineated statute that limits restitution to specific enumerated categories. Compare, *e.g.*, 18 U.S.C. 2259(b)(3)(F) (broadly providing restitution for "any other losses suffered by the victim as a proximate result of the offense"). In any event, "limiting the reach of Section 3663A(b)(4) does not prevent victims from fully recovering their losses"; "where criminal restitution statutes fall short, victims may bring their own civil actions to recover." Pet. App. 10a-11a (Higginson, J., concurring).

Opp. 11) over the proper reading of this important criminal statute. This Court alone can establish which interpretation is correct.[5]

b. Second, the government argues that, despite losing in *Papagno* under Section 3663A(b)(4), it might theoretically have won under Section 3663A(b)(1). And, according to the government, because such a hypothetical ruling in some future D.C. Circuit case could theoretically produce the same result as the one below, the admitted conflict (over the *actual* question presented involving the *actual* statutory provision at issue) is unworthy of review.

This is mere wishful thinking, and the government's speculation fails on multiple levels. For one, the government's argument cannot overcome *Papagno* itself, whose core rationale squarely repudiates the government's new theory.

According to the government, restitution is available under Section 3663A(b)(1) because the criminal fraud "'result[s] in' a victim's loss of property," which the government says includes subsequent investigation expenses. Br. in Opp. 7. But the property lost *from the offense* is the property *targeted in the offense* (*e.g.*, the unrecovered loan principal here, the stolen computer equipment in *Papagno*, etc.). That is the "property" that Section 3663A(b)(1) contemplates should be "return[ed] * * * to the owner." 18 U.S.C. 3663A(b)(1)(A). The offense

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[5] The government believes the D.C. Circuit should have written a narrower opinion than it actually did (Br. in Opp. 12), but that is wrong. The panel's "formulation" was its definitive construction of Section 3663A(b)(4), which assuredly *was* "necessary for the panel to resolve the case before it." *Ibid.* Indeed, it is entirely unclear how *Papagno* could have resolved that case—asking whether unprompted internal-investigation expenses were covered—without deciding the same question presented here.

itself did not *require* an internal investigation or other private costs, and the offense was complete with or without those subsequent expenditures. While "[i]t is true that [petitioner's] activities caused, in some Palsgrafian sense, the costs incurred by [GECC] for its internal investigation," those "consequential" costs are a step (or more) removed from the offense itself. *Papagno*, 639 F.3d at 1100.

That key rationale directly refutes the government's new theory. As *Papagno* explained, Section 3663A "is not a consequential damages statute." 639 F.3d at 1100; contra Br. in Opp. 13 (asking whether costs were "'a direct and foreseeable result'"). It recognized that "other[]" statutes provide more expansive coverage, but this one "does not afford a right to reimbursement for all costs caused in some sense by the defendant." *Ibid.* Its "text has a narrower focus," and "[w]e cannot distort the language of this statute to achieve an objective that its text does not reach." *Ibid.* It is thus hardly surprising that *Papagno* rejected, *by name*, the very decisions the government now invokes to support its Section 3663A(b)(1) argument. Compare Br. in Opp. 13 (citing *United States* v. *Elson*, 577 F.3d 713 (6th Cir. 2009), *United States* v. *Hosking*, 567 F.3d 329 (7th Cir. 2009), and *United States* v. *Scott*, 405 F.3d 615 (7th Cir. 2005)), with *Papagno*, 639 F.3d at 1101 ("respectfully disagree[ing]" with, *e.g.*, the "reasoning" of *Elson* and *Hosking*).[6]

Aside from this critical disconnect, the government's theory is incompatible with other aspects of *Papagno*'s analysis. For example, as *Papagno* recounted, Congress

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[6] While *Papagno* did not single out *Scott*, *Hosking* itself relied directly on *Scott* in its analysis; the two decisions, from the same circuit, stand for the same proposition. See 567 F.3d at 331-332. *Papagno* would accordingly reject them for the same reasons. 639 F.3d at 1101.

amended 18 U.S.C. 3663 in 2008 to cover "internal investigations" by "identity theft" victims, "even if the internal investigation was neither required nor requested by the criminal investigators or prosecutors." 639 F.3d at 1099 (describing 18 U.S.C. 3663(b)(6)). As *Papagno* explained, Congress's addition of Section 3663(b)(6) was necessary because Section 3663's *preexisting* sections—including Sections 3663(b)(1) and 3663(b)(4)—did not provide the same relief. *Id.* at 1099-1100. But Congress limited that new coverage to identify-theft victims, and "Congress did not add similar language to the mandatory restitution statute at issue in this case." *Id.* at 1099. Because "'it is generally presumed that Congress acts intentionally and purposely in [a] disparate inclusion or exclusion,'" this showed that Congress did not intend Section 3663A to "authorize restitution for costs of the kind associated with internal investigations." *Id.* at 1100 (quoting *Kucana* v. *Holder*, 558 U.S. 233, 249 (2010)). That logic, of course, applies equally to *all* provisions of the MVRA, including Section 3663A(b)(1). The government does not explain how the D.C. Circuit could suddenly adopt its Section 3663A(b)(1) argument without repudiating *Papagno*'s existing analysis.

In the end, the government's conjecture about what the D.C. Circuit, someday, might hold is simply that—*conjecture*. And it is especially implausible conjecture in light of the telltale signs that *Papagno* already forecloses the government's theory: the D.C. Circuit (i) squarely rejected the government's "consequential" damages point; (ii) expressly rejected the very decisions the government exclusively cites to support its theory; (iii) adopted reasoning (including its analysis of Section 3663(b)(6)) that is directly at odds with the government's approach; and (iv) did all this without overlooking Section 3663A(b)(1)—

which it specifically referenced in the opinion and reproduced in full in the opinion's appendix (639 F.3d at 1097, 1101-1102). It is simply fanciful to believe that the D.C. Circuit could adopt the government's view of Section 3663A(b)(1) without abandoning *Papagno* itself, in favor of the very decisions that *Papagno* "carefully considered" before "respectfully" parting ways. *Id.* at 1101. The government has no answer for any of these points, and its Hail Mary is plainly designed to avoid review of the *concrete* question that actually divides the circuits and was outcome-determinative below.[7]

Finally, the government overlooks a critical point: Given the "lopsided" nature of the split, the government is currently prevailing in multiple circuits on a theory that would undeniably fail in the D.C. Circuit (and under the dissenting views in two other courts of appeals). If the government believes that its aggressive, atextual reading of Section 3663A(b)(1) carries the day, it can always litigate that position in future courts. But it is currently getting a free pass, under a mistaken construction of Section

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[7] While it is sufficient that the D.C. Circuit would not adopt the government's aggressive reading of Section 3663A(b)(1), that reading has also been rejected by other circuits, which likewise refuse to shoehorn investigation expenses (which are already addressed by Section 3663A(b)(4)) into Section 3663A(b)(1), where they do not belong. See, *e.g.*, *United States* v. *Amato*, 540 F.3d 153, 161 (2d Cir. 2008) (Section 3663A(b)(1)'s "language deals with the restitution of lost or damaged property, not investigation or prosecution expenses"); cf. *United States* v. *Mullins*, 971 F.3d 1138, 1147 (4th Cir. 1992) ("restitution under the VWPA cannot include consequential damages such as attorney's and investigators' fees expended to recover the property"). The government does not acknowledge this contrary authority in its brief.

3663A(b)(4), in every circuit adhering to the "broad" interpretation of that provision. This entrenched conflict warrants the Court's review.[8]

* * *

In the end, the government's response effectively confirms that review is warranted. It admits that the circuits are intractably divided, with neither side willing to budge. It acknowledges that the issue is frequently recurring, as it indisputably is. It does not contest the issue's obvious importance, producing disparate results in criminal cases with millions (or more) at stake. And it never doubts (or even *questions*) that this is an ideal vehicle for deciding the question. The government simply believes its reading, not *Papagno*'s, should prevail on plenary review (which is reason to *grant* plenary review), and it simply hypothesizes an implausible scenario in which some non-existent, future decision in the D.C. Circuit undercuts *Papagno*'s holding—by adopting a weak, atextual view of Section 3663A(b)(1) that has failed in other circuits and is incompatible with *Papagno*'s core reasoning.

This case easily checks off every traditional criteria for certiorari. Further review is plainly warranted.

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[8] As the government admits (Br. in Opp. 13), its new theory under Section 3663A(b)(1) was rejected and foreclosed by earlier Fifth Circuit authority, which is why it had to rely exclusively on Section 3663A(b)(4) below. See, *e.g.*, *United States* v. *Onyiego*, 286 F.3d 249, 256 (5th Cir. 2002); cf. *United States* v. *Schinnell*, 80 F.3d 1064, 1070-1071 (5th Cir. 1996) (construing analogous coverage in Section 3663(b)(1)). The government does not explain why the D.C. Circuit might be more charitable with the government's dubious analysis.

## CONCLUSION

The petition should be granted.

Respectfully submitted.

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DECEMBER 2017

No. 16-1519

# In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

## JOINT APPENDIX


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**PETITION FOR A WRIT OF CERTIORARI FILED: JUNE 15, 2017**
**CERTIORARI GRANTED: JANUARY 12, 2018**

## TABLE OF CONTENTS


Page

Court of appeals docket entries ..... 1

District court docket entries ..... 4

Government's modified objection to the presentence investigation report, request for restitution and response to the defendant's objection respecting role (Oct. 26, 2015) ..... 14

Exhibit 1: Victim impact statement ..... 23

Exhibit 2: Victim impact statement ..... 26

Final presentence investigation report (Oct. 29, 2015) ..... 30

Addendum to the presentence report (Oct. 29, 2015) ..... 67

Defendant's response to the government's presentence investigation report objections and response to the addendum to the presentence investigation report (Dec. 5, 2015) ..... 73

Government's opposed motion to call witnesses at sentencing (Jan. 31, 2016) ..... 79

Order on opposed motion to call witnesses at sentencing (Feb. 2, 2016) ..... 83*


* Except for the docket entries from the district court and court of appeals, the remaining material in this joint appendix was originally filed under seal in the district court. The district court has since granted a motion to unseal that material. See D. Ct. Doc. 247 (Feb. 22, 2018).

The following opinions, decisions, judgments, and transcripts have been omitted in printing the joint appendix because they already appear on the following pages in the appendix to the petition for a writ of certiorari:

Appendix A: Court of appeals opinion (Mar. 23, 2017) ..... 1a
Appendix B: District court judgment (Feb. 18, 2016) ..... 12a
Appendix C: Trial transcript of the sentencing proceeding (Feb. 8, 2016) ..... 28a
Appendix D: Court of appeals judgment (Mar. 17, 2017) ..... 40a

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20146

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

SERGIO FERNANDO LAGOS,
Defendant-Appellant

DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 03/03/2016 | DIRECT CRIMINAL CASE docketed. NOA filed by Appellant Mr. Sergio Fernando Lagos [16-20146] (RLL) |
| | * * * * * |
| 05/17/2016 | SUFFICIENT APPELLANT'S BRIEF FILED. Sufficient Brief deadline satisfied. Paper Copies of Brief due on 05/31/2016 for Appellant Sergio Fernando Lagos. [16-20146] * * *. |
| 05/17/2016 | SUFFICIENT RECORD EXCERPTS FILED. Sufficient Record Excerpts deadline satisfied. Paper Copies of Record Excerpts due on 05/31/2016 for Appellant Sergio Fernando Lagos. [16-20146] * * *. |

| DATE | PROCEEDINGS |
|---|---|
| | * * * * * |
| 07/20/2016 | APPELLEE'S BRIEF FILED. E/Res's Brief deadline satisfied. Reply Brief due on 08/08/2016 for Appellant Sergio Fernando Lagos. Paper Copies of Brief due on 08/01/2016 for Appellee United States of America. [16-20146] * * *. |
| | * * * * * |
| 08/04/2016 | APPELLANT'S REPLY BRIEF FILED. # of Copies Provided: 0. Reply Brief deadline satisfied. Paper Copies of Brief due on 08/10/2016 for Appellant Sergio Fernando Lagos. [16-20146] * * *. |
| | * * * * * |
| 03/17/2017 | UNPUBLISHED OPINION FILED. [16-20146 Affirmed] Judge: ECP, Judge: SAH. Mandate pull date is 04/07/2017 for Appellant Sergio Fernando Lagos [16-20146] (ACM) |
| 03/17/2017 | JUDGMENT ENTERED AND FILED. [16-20146] (ACM) |
| 03/23/2017 | REVISED PUBLISHED OPINION FILED. [8451032-2] [16-20146] (JRS) |
| | * * * * * |

| DATE | PROCEEDINGS |
| --- | --- |
| 04/10/2017 | MANDATE ISSUED. Mandate pull date satisfied. [16-20146] (SBS) |

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

No. 4:13-cr-00554-1

UNITED STATES OF AMERICA, Plaintiff

v.

SERGIO FERNANDO LAGOS,
Defendant

DOCKET ENTRIES

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 08/27/2013 | 2 | INDICTMENT (The original indictment with the signature of the grand jury foreperson is on file under seal with the clerk) as to Sergio Fernando Lagos (1) count(s) 1, 2-6, Aurelio "Jim" Aleman-Longoria (2) count(s) 1, 2-6, Oscar Cano Barbosa (3) count(s) 1, 2-6, filed. (sclement, 4) (Entered: 09/05/2013) |
| | | * * * * * |
| 01/20/2015 | 97 | Minute Entry for proceedings held before Judge Kenneth M. Hoyt: RE-ARRAIGNMENT held on 1/20/2015. Sergio Fernando Lagos (1) Guilty Count 1, 2-6. Sentencing |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | set for 4/13/2015 at 10:00 AM in Courtroom 11A before Judge Kenneth M. Hoyt. Appearances: Casey Nicole MacDonald, Dan Lamar Cogdell. (Court Reporter: K. Miller) Deft continued on bond, filed. (chorace) (Entered: 01/20/2015) |
| | | * * * * * |
| 03/09/2015 | 103 | TRANSCRIPT as to Sergio Fernando Lagos re: Re-Arraignment held on January 20, 2015 before Judge Kenneth M. Hoyt. Court Reporter/Transcriber Kathleen K. Miller. Ordering Party Donean Surratt Release of Transcript Restriction set for 6/8/2015, filed. (kmiller, ) (Entered: 03/09/2015) |
| | | * * * * * |
| 08/07/2015 | 124 | Objection to Presentence Investigation Report (Sealed) by USA as to Sergio Fernando Lagos, filed. (Entered: 08/07/2015) |
| 08/10/2015 | 126 | Objection to Presentence Investigation Report (Sealed) by Sergio Fernando Lagos, filed. (Entered: 08/10/2015) |
| | | * * * * * |
| 10/26/2015 | 139 | Objection to Presentence Investigation Report (Sealed) by USA as |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | to Sergio Fernando Lagos, filed. (With attachments) (Entered: 10/26/2015) |
| 10/28/2015 | 140 | Sentencing Memorandum (Sealed) by Sergio Fernando Lagos, filed. (With attachments) (Entered: 10/28/2015) |
| | | * * * * * |
| 10/29/2015 | 147 | Final Presentence Investigation Report (Sealed) as to Sergio Fernando Lagos, filed. (ticlark, 4) (Entered: 10/29/2015) |
| 10/29/2015 | 148 | Sealed Attachment to 147 Final Presentence Investigation Report (Sealed) as to Sergio Fernando Lagos, filed. (ticlark, 4) (Entered: 10/29/2015) |
| 10/29/2015 | 149 | Sealed Addendum to 147 Final Presentence Investigation Report (Sealed) as to Sergio Fernando Lagos, filed. (ticlark, 4) (Entered: 10/29/2015) |
| 10/29/2015 | 150 | Confidential Sentencing Recommendation (Sealed) regarding Sergio Fernando Lagos, filed. (ticlark, 4) (Entered: 10/29/2015) |
| | | * * * * * |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 12/01/2015 | 156 | Sealed Event, filed. (Entered: 12/01/2015) |
| 12/02/2015 | 157 | Revised Confidential Sentencing Recommendation (Sealed) regarding Sergio Fernando Lagos, filed. (njanice, 4) (Entered: 12/02/2015) |
| 12/05/2015 | 159 | Response to Objections to PSR (Sealed) by Sergio Fernando Lagos, filed. (Entered: 12/05/2015) |
| 12/05/2015 | 160 | Sentencing Memorandum (Sealed) by Sergio Fernando Lagos, filed. (With attachments) (Entered: 12/05/2015) |
| | | * * * * * |
| 12/06/2015 | 162 | Sealed Event, filed. (Entered: 12/06/2015) |
| 12/07/2015 | 163 | Second Sealed Addendum to 147 Final Presentence Investigation Report (Sealed) as to Sergio Fernando Lagos, filed. (njanice, 4) (Entered: 12/07/2015) |
| 12/07/2015 | 164 | Revised Confidential Sentencing Recommendation (Sealed) regarding Sergio Fernando Lagos, filed. (njanice, 4) (Entered: 12/07/2015) |
| | | * * * * * |
| 01/06/2016 | 172 | Opposed MOTION to Produce Memoranda of Interview Relevant |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | to Sentencing by Sergio Fernando Lagos, filed. (Attachments: # 1 Proposed Order) (Cogdell, Dan) (Entered: 01/06/2016) |
| | | * * * * * |
| 01/22/2016 | 175 | ORDER denying 172 Motion to Provide Copies of Memoranda of Interview Relevant to Sentencing as to Sergio Fernando Lagos (1). (Signed by Judge Kenneth M. Hoyt.) Parties notified. (chorace) (Entered: 01/22/2016) |
| 01/27/2016 | 176 | Objection to Presentence Investigation Report (Sealed) by USA as to Sergio Fernando Lagos, filed. (With attachments) (Entered: 01/27/2016) |
| 01/31/2016 | 177 | Sealed Event, filed. (Entered: 01/31/2016) |
| 01/31/2016 | 178 | Sealed Event, filed. (With attachments) (Entered: 01/31/2016) |
| 02/01/2016 | 178 | Agreed MOTION for Order of Restitution Payment by Sergio Fernando Lagos, filed. (Attachments: # 1 Proposed Order) (Cogdell, Dan) (Entered: 02/01/2016) |
| 02/02/2016 | 180 | Sealed Order, filed. (Entered: 02/02/2016) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 02/04/2016 | 181 | Sealed Event, filed. (With attachments) (Entered: 02/04/2016) |
| 02/04/2016 | 182 | ORDER of Restitution Payment granting 179 Agreed MOTION for Order of Restitution Payment as to Sergio Fernando Lagos (Signed by Judge Kenneth M. Hoyt) Parties notified. (arrivera, 4) (Entered: 02/04/2016) |
| 02/04/2016 | 183 | Third Revised Confidential Sentencing Recommendation (Sealed) regarding Sergio Fernando Lagos, filed. (skearns, 4) (Entered: 02/04/2016) |
| 02/04/2016 | 184 | Third Sealed Addendum to 147 Final Presentence Investigation Report (Sealed) as to Sergio Fernando Lagos, filed. (skearns, 4) (Entered: 02/04/2016) |
| 02/09/2016 | 188 | MOTION to Amend *Judgments Respecting Restitution Payee Information* by USA as to Sergio Fernando Lagos, Aurelio Jim Aleman-Longoria, Oscar Cano Barbosa, filed. (Attachments: # 1 Proposed Order) (MacDonald, Casey) (Entered: 02/09/2016) |

* * * * *

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 02/09/2016 | 192 | Minute Entry for proceedings held before Judge Kenneth M. Hoyt: Sentencing held on 2/8/2016 for Sergio Fernando Lagos (1), Count(s) 1, 97 months custody of the BOP as to each count to run concurrently; 3 yrs SRT with standard and mandatory conditions; Deft not to commit another local/state/federal crime; Deft not to poss firearms or destructive devices; DNA sample; Deft is prohibited from credit card access and must provide financial information to probation as requested; $100-SA as to each count for a total of $600 – due and payable immediately; Restitution totaling $15,970,517.37 owed to GE Capital to be paid not less than $1,000.00 a month commencing 60 days after release; No fine; Rulings as stated on the record; Appeal rights explained. Deft's request to surrender voluntarily is GRANTED. The deft is ORDERED to surrender to the United States Marshal Service on March 8, 2016, before the close of business in McAllen, Texas. The Court does not oppose any request by the deft to be housed as close as possible to McAllen, Texas, or at |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | the Three Rivers facility and any appropriate programs. Appearances: U.S. Probation – H. Mejia, Dennis Hester. Casey Nicole MacDonald, Dan Lamar Cogdell. (Court Reporter: M. Malone) Deft continued on bond, filed. (chorace) (Entered: 02/09/2016) |
| 02/11/2016 | 195 | RESPONSE in Opposition by Sergio Fernando Lagos re 188 MOTION to Amend *Judgments Respecting Restitution Payee Information*, filed. (Cogdell, Dan) (Entered: 02/11/2016) |
| 02/11/2016 | 199 | ORDER granting 188 Motion to Amend as to Sergio Fernando Lagos (1), Aurelio Jim Aleman-Longoria (2), Oscar Cano Barbosa (3). (Signed by Judge Kenneth M. Hoyt.) Parties notified. (arrivera, 4) (Entered: 02/11/2016) |
| 02/18/2016 | 202 | JUDGMENT as to Sergio Fernando Lagos (Signed by Judge Kenneth M. Hoyt) Parties notified. (olindor, 4) (Entered: 02/18/2016) |
| 02/18/2016 | 203 | Statement of Reasons (Sealed) as to Sergio Fernando Lagos. NOTICE: Document available to applicable parties only. Authorized users en- |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | ter CM/ECF Filer login and password first for authentication. Instructions available at http://www.txs.uscourts.gov/attorney-information – Electronic Access to Sealed Documents. Be sure to **SAVE** the document locally at the time of viewing, filed. (Entered: 02/18/2016) |
| 02/22/2016 | 211 | REPLY TO RESPONSE to Motion by USA as to Sergio Fernando Lagos re 188 MOTION to Amend *Judgments Respecting Restitution Payee Information*, filed. (Attachments: # 1 Exhibit 1, # 2 Errata 2) (MacDonald, Casey) (Entered: 02/22/2016) |
| 02/29/2016 | 213 | Unopposed MOTION to Continue Deadline to File Notice of Appeal by Sergio Fernando Lagos, filed. (Attachments: # 1 Proposed Order) (Cogdell, Dan) (Entered: 02/29/2016) |
| | | * * * * * |
| 03/01/2016 | 215 | NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit by Sergio Fernando Lagos as to Sergio Fernando Lagos (Filing fee $505, receipt number 0541- |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | 16256516.), filed. (Schaffer, Randolph) (Entered: 03/01/2016) |
| | | * * * * * |
| 03/03/2016 | 223 | ORDER granting 213 Motion to Extend Time to File Notice of Appeal to April 2, 2016 as to Sergio Fernando Lagos (1). (Signed by Judge Kenneth M. Hoyt.) Parties notified. (chorace) (Entered: 03/03/2016) |
| | | * * * * * |
| 03/31/2016 | 231 | APPEAL TRANSCRIPT as to Sergio Fernando Lagos re: Sentencing<br>held on February 8, 2016 before Judge Kenneth M. Hoyt. Court Reporter/Transcriber Mayra Malone. Ordering Party Randy Schaffer. This transcript relates to the following: 217 Appeal Transcript Request. Release of Transcript Restriction set for 6/29/2016, filed. (mmalone, ) (Entered: 03/31/2016) |
| | | * * * * * |

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. H-13-554 (1)

UNITED STATES OF AMERICA

v.

SERGIO FERNANDO LAGOS

Filed: October 26, 2015

**GOVERNMENT'S MODIFIED OBJECTION TO THE PRESENTENCE INVESTIGATION REPORT, REQUEST FOR RESTITUTION AND RESPONSE TO THE DEFENDANT'S OBJECTION RESPECTING ROLE**

COMES NOW, the United States of America, by and through Kenneth Magidson, United States Attorney, and Casey N. MacDonald, Assistant United States Attorney for the Southern District of Texas and files this Sealed Modified Objection to the Presentence Investigation Report (PSR) and Request for Restitution and Response to the Defendant's Objection to the PSR respecting role:

**I. The Amount of Loss Should be Offset by Disposition of Collateral**

U.S.S.G. § 2B1.1, cmt. n. 3E(ii) provides "in cases involving collateral pledged or otherwise provided by the

defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing. The defense objection to the PSR observes that this collateral section of the U.S.S.G. applies in this case. The Government agrees. The amount of loss should be offset by the amount recovered from the disposition of pledged collateral.

Based on the defendants' fraudulent scheme, GE Capital was induced to loan the defendants' company $35,000,000.00. This represents the intended loss caused in this case. However, the defendants' pledged collateral to obtain this line of credit. The financing agreement executed between the defendants and GE Capital provided that the loan was secured by collateral. The agreement defined "collateral" as "all present and future accounts; chattel paper, instruments; general intangibles; documents; all assets including, without limitation, inventory, equipment of every kind and description; furniture and fixtures; deposit accounts; money; investment property; letters of credit; notes; tax refund and insurance proceeds."

GE Capital recovered monies from the disposition of various collateral, detailed in the original victim impact statement (Attached as Government's Exhibit 1). After recovery of those monies, GE Capital was and is still owed $11,074,047.64, which represents the unsecured principal amount of the loan. This amount does not include interest nor does it include fees for attorney or other expenses. (See supplemental victim impact statement, attached as Government's Exhibit 2). Accordingly, the Government withdraws its previously filed objection

(D.E. 125) concerning the amount of loss and submits that the amount of loss for U.S.S.G. purposes is $11,074,047.64, warranting a 20 level increase under U.S.S.G. § 2B1.1(b)(1)(K).

## II. Restitution

Restitution under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, is a criminal penalty and a part of the defendant's sentence. *United States v. Adams*, 363 F.3d 363, 365 (5th Cir. 2004). The MVRA serves to reimburse victims of a crime for losses suffered that are caused by the defendant. The MVRA authorizes the district court to order restitution for victims of fraud offenses. 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(ii). The statute provides that "the court shall order restitution to each victim in the full amount of each victim's loss as determined by the court" 18 U.S.C. § 3664(f)(1)(A). The Government bears the burden of proving loss to the victim by a preponderance of the evidence. 18 U.S.C. § 3664(6)(e). Under the MVRA, actual loss to the victim is used to calculate restitution. *See* 18 U.S.C. § 3664(f)(1)(A). Restitution is award to victims "directly and proximately harmed" as a result of a defendant's conduct. 18 U.S.C. § 3663A(a)(2). An award greater than the victim's actual losses exceeds the MRVA's statutory maximum. *United States v. Sharma*, 703 F.3d 318, 322 (5th Cir. 2012).

In addition to allowing the defendants to steal millions of dollars from GE Capital, the defendants' fraudulent scheme plunged USA Dry Van into bankruptcy. Consequently, the loss in this case includes the unpaid balance of the GE Capital's loan to the defendants and the monies GE Capital spent on attorneys fees who rep-

resented their interest in the bankruptcy actions. Because the bankruptcy actions were a direct and proximate cause of the defendants' fraudulent scheme, those costs are actual losses sustained by GE Capital. The total amount of actual loss to GE Capital is $11,862,945.52. This figure represents the unsecured balance of the unpaid loan, $11,074,047.64, and the attorney fees paid in connection with the bankruptcy proceedings: $1,039.50 to Foley & Mansfield and $787,858.38 to Jordan, Hyden, Womble, Culbreth & Holzer.

Further, 18 U.S.C. § 3663A(b)(4) provides that a victim will be reimbursed for any lost income or "other expenses incurred during participation in the investigation or prosecution of the offense." "Other expenses" include investigative audit expenses fees incurred by a victim in investigating the fraud. *United States v. Phillips*, 477 F.3d 215, 224 (5th Cir. 2007) (upholding district court's award for expenses incurred by University of Texas in investigating extent of defendant's data theft and expenses incurred in notifying victims) and *United States v. Herrera*, 606 Fed. Appx. 748, 752-53 (unpublished) (5th Cir. 2015) (upholding district court's restitution order that included investigative audit expenses of a CPA hired by the victim District prior to pursuing criminal charges under the MVRA as "other expenses incurred during participation in the investigation of the offense under 3663A(b)(4)," noting the duration and complexity of defendant's fraud); *see also United States v. Hosking*, 567 F.3d 329, 332 (7th Cir. 2009) (holding MVRA specifically contemplated inclusion of investigative expenses bank victim incurred in investigating complex embezzlement scheme in a restitution award finding that the bank's investigation led to the determination of the actual amount

embezzled); *See United States v. Amato*, 540 F.3d 153, 162 (2nd Cir. 2008) (finding that the victim corporation could get restitution for attorney fees and auditing costs that were necessary investigative expenses that ultimately led to the prosecution the defendants who committed a complicated fraud scheme).

In this case, GE Capital was required to spend an inordinate amount of resources investigating the extent of the defendants' fraud to determine the amount of actual loss. In order to preserve potential electronic evidence, it was necessary for GE Capital to hire Stroz Freidberg, a computer forensics company to forensically image hard drives and computer systems used by the defendants to effectuate their fraudulent schemes. The electronic data preserved contained records that allowed GE Capital to determine the actual amount of the defendant's fraud. The preservation of this data was ultimately vital to the later prosecution of the defendants. GE Capital also was required to retain Conway Del Genio (CDG) a consulting company to determine the extent of the loss and the defendants' company true financial condition.

A victim is also entitled to the reimbursement for attorneys fees incurred that were necessary in investigating or prosecuting the fraud. *See United States v. Dwyer*, 275 Fed. Appx. 269 (unpublished) (5th Cir. 2008) (finding no plain error in district court's inclusion of attorney fees incurred throughout investigation and prosecution); *United States v. Beaird*, 145 Fed. Appx. 853 (unpublished) (5th Cir. 2005) (finding no plain error in district court's order awarding victim attorney fees and litigation expenses); *Amato, supra*, 540 F.3d at 162. GE Capital paid $1,721,860.59 to Latham & Watkins and

$54,325.03 to Winston and Strawn, each of whom provided necessary counsel in connection with the fraud.

For those reasons, the Government requests that the Court order restitution in the amount of $15,970,517.37. As the below breakdown reflects, this amount constitutes the unsecured amount still owed on the loan, forensic fees, consulting fees and attorney fees incurred by G.E. Capital; it does not include interest on the loan:

| | | |
|---|---|---|
| a. | $ 11,074,047.64 | (actual loss to victim: unsecured principal balance on loan) |
| b. | $ 787,897.88 | (actual loss to victim: legal fees in bankruptcy proceedings) |
| c. | $ 20,092.32 | (forensic expert fees in investigating fraud) |
| d. | $ 1,776,290.24 | (legal fees in investigating fraud) |
| e. | $ 2,311,189.29 | (consulting fees in investigating fraud) |

**III. Role: The defendant was a leader/organizer**

A defendant's offense level is increased by four levels if he "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." USSG § 3B1.1(a). "A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." USSG § 3B1.1, cmt. n.1. The defendant himself can be included in the number of participants. *See United States v. Cooper*, 274 F.3d 230, 247 (5th Cir. 2001).

To qualify for the adjustment, the defendant must have occupied an aggravating role as to at least one of the participants. USSG § 3B1.1, cmt. n.2. "In assessing

whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered." USSG § 3B1.1, cmt. n.3. Some factors that distinguish a leader or organizer from a manager or supervisor (which would result in a three-level adjustment) include:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

USSG § 3B1.1, cmt. n.4.

The PSR shows that the defendant was the leader and organizer of a complex fraudulent scheme. This defendant devised the scheme to defraud and instructed Barbosa as how to effectuate it. (PSR Paragraphs 19, 21, 24, 41) It cannot be reasonably argued that the ongoing, massive fraud in this case was not extensive.

In addition to the conduct of the three defendants, because the extent of the fraud was so great, it required virtually every employee in the accounting departments to execute it and to conceal it. At sentencing, the Government will adduce testimony from Special Agent Derick Lacina who conducted interviews of the following employees who assisted in executing and concealing the ongoing fraudulent scheme on a daily basis: 1) Julie Aleman, as a supervisor in the billing and collections department; 2) Venessa Montalvo, Controller for South Texas Petroleum (STP), a subsidiary corporation of Golagale

LLC; 3) Miriam Aranda, a billings and collections supervisor; 4) Laura Vasquez, a supervisor in the billing department; 5) Daisy Quintanilla, a billing clerk and 6) Rene Aguirre, a clerk in collections and billing. These employees had to create the false account receivables (A/R), they created customer codes to track the fake invoices, they created the corresponding false A/R entries could be entered into USADV electronic billing and accounting systems and they created fraudulent invoices and related supporting documentation to support false A/R entries to conceal the fraud from GE Capital, auditors and accountants.

Finally and most significantly, this defendant enjoyed the largest fruits of the fraud conspiracy. (PSR Paragraphs 36, 37, 38, 39) Consideration of the factors under U.S.S.G. § 3B1.1, cmt. n.4 establish that the defendant was no mere average participant. He was a leader and/or organizer. Accordingly, a four-level upward adjustment is warranted.

## IV. Conclusion

WHEREFORE, PREMISES CONSIDERED, the Government requests that the Court grant the Government's Modified Objection to the Presentence Investigation Report and find that the intended loss in this case was $11,074,047.64. The Government requests that the Court enter an order of restitution in the amount of $15,970,517.37. The Government requests that the Court find that the defendant was a leader and an organizer warranting a four-level upward adjustment pursuant to U.S.S.G. § 3B1.1.

Respectfully submitted,

KENNETH MAGIDSON
United States Attorney

By: */s Casey N. MacDonald*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Government's Objection to the Presentence Investigation Report was served to the Defendant's attorneys of record, Dan L. Cogdell and John A. Convery, Jr., and the U.S. Probation Office by e-mail, on this 26th day of October, 2015.

*s/ Casey N. MacDonald*
Casey N. MacDonald

Government Exhibit 1

## VICTIM IMPACT STATEMENT

Victim: General Electric Capital Corporation
GE Capital
USAO Number: 2010R09670
Court Docket Number: 13-CR-00554

Insert the impact of the crime here (or, if a separate victim impact form is attached, please use that form to describe the impact of the crime):

General Electric Capital Corporation ("GE Captial")[1] is the owner and holder of certain promissory notes, account financing agreements, security agreements, financing statements, certificates of title and the related loan documents, as well as personal property lease agreements and related lease documents (the "Documents") made by the following companies: Logistics Carriers, LLC, USA Dry Van Logistics, LLC, USA Log. Carriers, LLC, USA Logistics Carriers, LLC, South Texas Petroleum, LLC, North American Trailer Rentals, LLC (collectively, the "Borrowers"). Aurelio Aleman, Sergio F. Lagos and Oscar Barbosa (collectively, the "Defendants") were officers of the Borrowers.

On or about January 15, 2010, GE Capital discovered that Defendants committed fraud, thereby harming GE Capital. On February 2, 2010, the Borrowers filed volun-

[1] As used herein, GE Capital includes certain affiliates, including Colonial Pacific Leasing Corporation.

tary Chapter 11 bankruptcy petitions in the U.S. Bankruptcy Court for the Southern District of Texas (the "First Bankruptcy Cases"). GE Capital filed proofs of claim in the Borrowers' First Bankruptcy Cases which asserted that, as of February 2, 2010, Borrowers owed GE Capital $41,509,369.12. GE Capital's debt was secured by liens on accounts receivable and various items of personal property used by Borrowers, including the equipment which was financed or leased pursuant to the Documents.

Consistent with orders entered by the bankruptcy court, GE made advanced to the Debtors during the bankruptcy case to enable the Debtors to continue operating during the First Bankruptcy Cases. The Borrowers' First Bankruptcy Cases were closed on December 28, 2010. At the time the Borrowers emerged from the First Bankruptcy Cases, GE Capital was owed approximately $45,782,216; this amount included a $500,000 substantial contribution claim awarded to GE Capital for its work in the First Bankruptcy Cases. Of the total amount owing to GE Capital when the Borrowers emerged from the First Bankruptcy Cases, $29,313,923 was secured by collateral.

Sometime after the First Bankruptcy Cases were closed, the Debtors decided to liquidate the business. On May 16, 2012 the Debtors engaged Raymond James to assist with the liquidation. Although GECC continued making advances during the liquidation, GECC also received proceeds as its collateral was liquidated. All such proceeds have been credited to the Borrowers' obligations and are reflected in the amount still owing as set forth in the amended proof of claim described below. On or about August 6, 2012, the Debtors sold their rolling

stock assets to Celadon. GECC received $4,543,000 from the disposition of the tractors and trailers it financed for the Debtors, most of which came from Celadon. GECC also received more than $9.2 million in account receivable collections after the sale to Celadon. Other significant credits include proceeds collected from settlements with a guarantor and with the Debtor's CPA firm. Finally, the amount owing also accounts for the proceeds received from the sale of certain real property located in Hidalgo County, Texas owned by Sergio Lagos, which was sold in September, 2010. The Borrowers filed their second voluntary bankruptcy petitions on October 28, 2013 (the "Second Bankruptcy Cases"). As of October 28, 2013, GE Capital was owed $16,656,136.57. GE Capital filed a proof of claim in the Second Bankruptcy Cases on August 4, 2014, asserting that, as of October 28, 2013, GE Capital was owed $11,760,666.84. This amount included principal and interest due with respect to the revolving debt and principal due from the term loan debt. This proof of claim **did not** include GE Capital's legal and forensic expert fees of $2,584,280.44, consulting fees in the amount of $2,311,189.29 or interest on the term debt. On June 17, 2015, GE Capital amended the proof of claim filed in the Second Bankruptcy Cases to include these legal and forensic expert and consulting fees setting forth the total amount in this paragraph. GE Capital's claim against the Borrowers is unsecured since all of the collateral securing the GE Capital debt was liquidated and proceeds applied to the debt prior to the filing of the Second Bankruptcy Cases.

Government Exhibit 2

## VICTIM IMPACT STATEMENT

Victim: General Electric Capital Corporation
GE Capital
USAO Number: 2010R09670
Court Docket Number: 13-CR-00554

Insert the impact of the crime here (or, if a separate victim impact form is attached, please use that form to describe the impact of the crime):

General Electric Capital Corporation ("GE Capital")[1] submits this supplement to the Victim Impact Statement ("VIS") previously submitted in this case on July 1, 2015.

As set forth in the VIS, as of October 28, 2013, GE Capital was owed $16,656,136.57. This amount includes principal in the amount of $11,074,047.64, interest in the amount of $686,619.20, legal fees in the amount of $2,564,188.12, forensic expert fees in the amount of $20,092.32, and consulting fees in the amount of $2,311,189.29.

Given the magnitude and nature of Defendants' admitted fraud, GE Capital employed forensic experts to secure and preserve electronic data. In addition, GE Capital employed lawyers and consultants to investigate the extent of the fraud, provide legal advice in connection

[1] As used herein, GE Capital includes certain affiliates, including Colonial Pacific Leasing Corporation.

with its claims against the Borrowers and the Defendants, the bankruptcy proceedings, and to protect its rights and preserve its collateral.

GE Capital retained the following firms and consultants:

- Latham & Watkins (555 West Fifth Street, Los Angeles, CA): GE Capital retained Latham & Watkins to provide legal advice relating to Defendants' fraud and Borrower's likely bankruptcy filing. GE Capital worked specifically with Doug Bacon, Steve Tetro, Vik Puri and other professionals associated with the firm who provided GE Capital with the necessary counsel in connection with the fraud, the bankruptcy proceedings and the claims against the Borrowers. The total amount of fees paid to Latham & Watkins for their work was $1,721,860.59.

- Foley & Mansfield (250 Marquette Avenue, Minneapolis, MN 55401): GE Capital consulted Thomas Lallier of Foley & Mansfield on the likely bankruptcy filings by Borrowers. Mr. Lallier was the external counsel who originally drafted many of the documents between GE Capital and Borrower. GE Capital sought Mr. Lallier's legal advice on the enforceability of the loan documents against Borrowers, including but not limited to a review of the UCC filings and assistance with the anticipated bankruptcy filings. GE Capital paid Foley & Mansfield $1,039.50 in fees for their work on this matter.

- Jordan, Hyden, Womble, Culbreth & Holzer (500 North Shoreline, Corpus Christi, TX 78401): As part of the anticipated bankruptcy filing by Borrower and to assist GE Capital with issues locally, GE Capital retained the services of Shelby Jordan and others associated with the firm, Jordan, Hyden, Womble, Culbreth & Holzer to

represent GE Capital in court, including in the bankruptcy court, as well as to meet directly with the Borrower and Borrower's counsel locally and to assist with any local filings and proceedings, including the prosecution of claims against the Defendants and the other guarantor. GE Capital paid Jordan, Hyden, Womble, Culbreth & Holzer a total of $787,858.38 for their work on this matter.

- Winston & Strawn (36235 Treasury Center, Chicago, IL 60694-6200): GE Capital retained J. David Reich of Winston & Strawn's New York office to assist in the investigation of Defendants' fraud and to assess any potential claims or liability regarding the firm that audited Borrowers. Initially, Hannah Blumenstiel, who was associated with Winston & Strawn at the time was seconded to GE Capital and worked on the matter at no charge. At the end of her secondment, however, and upon her return to the law firm, GE Capital continued to call on her to provide legal advice in addition to Mr. Reich. GE Capital paid Winston & Strawn $54,325.03 for their work on the matter.

- Stroz Friedberg (32 Avenue of the Americas, 4th floor, New York, NY 10013): Stroz Friedberg is a computer forensics, investigations and electronic discovery technical services firm. GE Capital retained Stroz Friedberg's Dallas office shortly after the Defendants informed GE Capital that they had committed the fraud. At GE Capital's request and to ensure that none of Borrower's key electronic documents or systems were lost, Stroz Friedberg took forensic images of twelve hard drives for twelve custodians, forensically copied all of the exchange database files, made full back-ups of the MAS90

accounting system and the TMW Operating System, forensically copied the Accounts Payable and Billing systems and forensically copied all exchange database files. GE Capital paid Stroz Friedberg $20,092.32 for their work.

- Conway Del Genio ("CDG") was retained to assist in determining the Borrower's true financial condition, and to advise whether the Borrowers could survive as a going concern. CDG was paid $2,311,189.29.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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Docket No. 4:13CR00554-001

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UNITED STATES OF AMERICA

vs.

SERGIO FERNANDO LAGOS

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Filed: October 29, 2015

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**PRESENTENCE INVESTIGATION REPORT**

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**Prepared For:** Honorable Kenneth M. Hoyt
United States District Judge

**Prepared By:** Hugo E. Mejia
United States Probation Officer
Houston, TX
* * *

Kimberly Vaults
United States Probation Officer
Houston, TX
Lead writer
* * *

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Dan Lamar Cogdell
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**Sentence Date:** September 8, 2015, at 10:00 a.m.

**Offense:** Count 1: Conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1349 and 1343. Not more than 20 years, not more than $250,000 fine, not more than 3 years of supervised release, mandatory restitution, and a $100 special assessment. (Class C Felony)

Count 2-6: Wire fraud, in violation of 18 U.S.C. § 1343. Not more than 20 years, not more than $250,000 fine, not more than 3 years of supervised release, mandatory restitution, and a $100 special assessment. (Class C Felonies)

**Date Report Prepared:** July 10, 2015

**Date Report Revised:**

**Release Status:** The defendant was arrested by immigration officials on September 4, 2013. The defendant was released on the same date under $50,000 unsecured bond, and placed on pretrial release supervision, in McAllen, Texas.

| | |
|---|---|
| **Detainers:** | None. |
| **Codefendants:** | Aurelio "Jim" Aleman-Longoria<br>4:13CR00554-002 |
| | Oscar Cano Barbosa<br>4:13CR00554-003 |
| **Related Cases:** | SDTX 7:10CV00077 |

* * * * *

**PART A. THE OFFENSE**

Charges and Convictions

1. On August 27, 2013, a six-count Criminal Indictment was filed in the United States District Court for the Southern District of Texas, Houston Division, naming **Sergio Fernando Lagos**, Aurelio "Jim" Aleman-Longoria and Oscar Cano Barbosa, as the defendants. Count 1 charged all defendants with conspiracy to commit wire fraud beginning in or around March 2008 and continuing until at least January 31, 2010. Counts 2 through 6 charged all defendants with wire fraud on September 8, 2008 (Count 2), September 2, 2009 (Count 3), October 2, 2009 (Count 4), November 2, 2009 (Count 5), and November 2, 2009 (Count 6).

2. The Indictment notifies all defendants that upon conviction, a money judgment may be imposed equal to the total value of property subject to forfeiture, for which the defendant may be jointly and severally liable. That amount is estimated to be, but is not limited to, approximately $26,254,781.

3. On January 20, 2015, **Sergio Fernando Lagos** appeared with counsel for rearraignment before United States District Judge Kenneth M. Hoyt, and entered a plea of guilty as to Counts 1 through 6 of the Criminal Indictment, without a plea agreement. The Court accepted the defendant's guilty plea and a Presentence Report was ordered. Sentencing was deferred to a later date and the defendant was continued on bond.

4. According to the U.S. Pretrial Services officer, the defendant is in full compliance with all conditions.

The Offense Conduct

5. Information for this section was obtained through the investigative file material of the United States Attorney's Office, Immigration and Customs Enforcement (ICE), Homeland Security Investigations (HIS), the Federal Bureau of Investigation (FBI) and General Electric Capital Corporation (GECC). The assigned case agents were also contacted regarding this case.

Background

6. USA Dry Van Logistics LLC (USADV) was a trucking company, specializing in cross-border trucking servicing the maquiladora industry.[1] The USADV corporate headquarters were located in McAllen, Texas. USADV was a subsidiary of Golagale Holdings, LLC, and Affiliate (Golagale Holdings). There

[1] The maquiladora industry involves the shipment of goods, products or materials into Mexico, on a duty-free or tariff-free basis, where the goods are assembled or manufactured by Mexican factories before being exported back to the United States for end use or sale.

were other operating subsidiaries of Golagale Holdings including U.S.A. Logistic Carriers, LLC, and USA Log Carriers, LLC.

7. **Sergio Fernando Lagos** was the owner, Chief Executive Officer and a member of the Board of Directors of Golagale Holdings, LLC.

8. Aurelio "Jim" Aleman-Longoria was an owner, Chief Operations Officer and a member of the Board of Directors of Golagale Holdings, LLC.

9. Oscar Cano Barbosa was the Controller for Golagale Holdings, LLC and USADV.

10. General Electric Capital Corporation (GECC) was a non-bank lending corporation that provided capital to businesses. GECC was a Delaware company with its principal place of business in Norwalk, Connecticut.

11. Aleman-Longoria and **Lagos** entered into a Revolving Loan financing agreement on behalf of USADV with GECC, under which GECC would issue revolving line of credit which was secured by USADV's accounts receivable. The financing agreement required the borrowers to use all proceeds of the Revolving Loan for business purposes and to promptly notify GECC of any material change in the business or financial affairs of the Borrowers.

12. The maximum amount that could be borrowed under the financing agreement varied and was calculated using a formula based on the Borrower's "eligible" accounts receivable. Eligible accounts receivable were those not more than ninety (90) days old. The financing agreement required that all accounts

receivable were and would be bona fide, legal and existing obligations created by the rendition of services actually rendered. The financing agreement provided that the maximum amount that the Borrowers could borrow under the Revolving Loan in any given month was the sum of a percent of the Borrowers' eligible accounts receivable.

13. Pursuant to the Agreement, USADV justified advances on the line of credit by submitting "Borrowing Base Certificates" (BBCs) to GECC. BBCs had to be certified as true, complete and accurate by an officer of USADV. GECC relied on the BBCs to determine the amount that USADV could borrow at any given time.

14. The Agreement also required the Borrowers to maintain a standard system of accounting in accordance with generally accepted accounting principles in the United States and, on a quarterly and/ or annual basis, to provide consolidated balance sheets, statements of profits and loss reflecting the financial condition of the Borrowers and its affiliates and statements of assets and liabilities of each Guarantor, accompanied by a certificate signed by the Borrowers' president and treasurer certifying that each officer had received the provision of the Agreement and stating that the Borrowers have not been in default as to any provisions contained in the Agreement.

15. The Agreement also required the Borrowers to use all the proceeds of the Revolving Loan for business purposes and to promptly notify GECC of any material change in the business or financial affairs of the Borrowers.

16. In May 2003, USADV obtained a line of credit from GECC for approximately two to three million dollars. This line of credit eventually increased to $35,000,000 by October 27, 2009. By December 31, 2009, USADV had borrowed $28,892,896.94, of the $35,000,000, that they were eligible to borrow. USADV pledged their accounts receivables[2] as collateral to obtain this line of credit. During this time period, in order to receive additional money from the line of credit, USADV was required to submit a document called a Borrowing Base Certificate (BBC) to GECC. USADV was eligible to request up to the lesser amount of $35,000,000 or 85% of their eligible accounts receivable for a specific time period which would qualify them for additional funds.

17. Beginning in or around March 2008, and continuing until at least January 31, 2010, Barbosa, Aleman-Longoria and **Lagos** conspired to defraud and obtain money from GECC by means of materially false and fraudulent pretenses, representations and promises. The object of the conspiracy was to mislead GECC about the true value of the Borrower's accounts receivable so that the Borrowers could continue to receive a line of credit from GECC and induce GECC to increase the maximum amount of the Revolving Loan, thereby, providing uncollateralized funds to the Borrowers. Barbosa, **Lagos** and Aleman deliberately and falsely overstated and caused to be overstated the accounts receivable on

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[2] Accounts receivables are monies owed to a business by to its customers typically generated through sales. USADV was eligible to receive a loan up to 85% of their total eligible accounts receivable balance with a limit of $35,000,000 as of October 27, 2009.

the BBCs and the consolidated financial statements that were electronically supplied to GECC. At their direction, the accounts receivable were successfully, deliberately and falsely overstated by: booking fictitious sales, thereby creating fictitious accounts receivable; using the fictitious accounts receivable as collateral to obtain additional loan funds from GECC; transferring by interstate wire transfer, funds received from GECC which had been deposited into the USADV bank account at Hibernia National Bank in Texarkana, Texas; to the Lockbox[3] account at Harris Trust and Savings Bank in Chicago, Illinois, in order to disguise the payments as customer payments; applying said payments to the fictitious customer accounts to give the false appearance to GECC that the fictitious accounts receivable were entirely legitimate and being collected from genuine customers; and "re-aging"[4] the accounts receivable by issuing credits for historical sales invoices, then rebooting the sales so that they appeared to have been incurred more recently, and were thus more valuable and "eligible" for use as collateral.

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[3] The Revolving Loan Agreement required that USADV use a Lockbox account set up for the Accounts Receivable under the control of GECC (Corporate Checking Account with Harris N.A. Bank in Chicago, Illinois Account.)

[4] Re-aging of accounts receivable occurred at USADV when a credit was issued for an old sale invoice and the same invoice was re-invoiced with a new date and invoice number so that it was more current, thus permitting accounts receivable that were otherwise older than 90 days to be falsely counted as eligible accounts receivable.

18. In March 2008, USADV began implementing a scheme where they would fraudulently increase their accounts receivable balance which would allow them to illegally obtain additional funds from the line of credit. On December 31, 2012, it was estimated that approximately $10,540,188.75, of the $37 266,037.49, accounts receivable on USADV books were legitimate. USADV obtained the majority of the line of credit based on this approximately $26,725,787.71, of fraudulent account receivables that never existed.

The Conspiracy

19. Beginning in 2008, USADV began having cash flow issues. **Lagos** had a meeting with Aleman-Longoria and Barbosa and during the meeting, **Lagos** discussed the scheme that he devised, where USADV would fraudulently increase their accounts receivables for the purpose of requesting additional money from the line of credit obtained from GECC. **Lagos** instructed Barbosa to assist in the implementation of the fraudulent scheme. **Lagos** also tasked Barbosa with involving other USADV accounting personnel, which included Julie Aleman (Aurelia Aleman's daughter).

20. In order to carry-out the fraudulent scheme, USADV figured out a way that they could disconnect their Transportation Dispatch System (TMW), which kept track of all of their legitimate sales from their accounting software (MAS). Once they disconnected the two systems, they could manually post fraudulent sales to the MAS system. By creating false sales, this would artificially inflate their accounts receivable account balance. USADV would

then report the fraudulent increase in accounts receivables on the BBC's which were in turn submitted to GECC. GECC would then loan USADV up to 85% of their eligible accounts receivables which consisted of the fraudulent accounts.

21. USADV created fraudulent invoices using existing customers and also used "customers" that USADV had not done business with. **Lagos** devised the idea to put an "S" in front of all of the fraudulent invoices in order to track them. USADV kept one register for the legitimate accounts receivables and a separate register for the fraudulent accounts receivables. In an effort to conceal the fraud, each time USADV was audited, the staff would create false paper invoices for all of the fraudulent invoices that the auditors would sample. Whenever the auditor would request these fraudulent "S" invoices, Barbosa would delay the auditors so that he could provide the invoices the following day which would give the staff time to create fictitious invoices. On the night before the invoices were due, Barbosa and the accounting staff would stay late and create these fake "S" invoices. The accounting staff would also locate legitimate proof of delivery documents with dates in close proximity to the date of the fictitious invoices. They would then provide this legitimate proof of delivery documents along with the fictitious invoices to the auditors the following day in order to conceal the fraud.

22. Each time fraudulent "S" invoices would reach past due status, USADV employees would either wire funds from their operating account to a lockbox to disguise the payments as customer payments and

apply those payments to the fake customer accounts; or they would delete the old fraudulent invoices from the system and create a new fraudulent invoices for the same amount with a newer date.

23. Throughout the scheme, Barbosa sent emails to **Lagos** and Aleman-Longoria detailing the amount of fraudulent borrowing. According to Aleman-Longoria, Barbosa also sent emails to he (Aleman-Longoria) and **Lagos** telling them to stop spending so much money.

24. **Lagos** would determine the shortfall in their operating account and then instruct Barbosa on the amount of additional false invoices that would need to be created in order to obtain additional funds. Barbosa would then instruct and assist the accounting department on how many false invoices to create. It is noted that the accounting staff were all aware of the fraud they were committing.

25. Aleman-Longoria admitted to investigators that he was aware that the money he was spending was obtained through fraudulent activity and he took full responsibility for his actions.

26. GECC hired the Jabez Group to perform field exams[5] which were scheduled for every six months. During these field exams, the Jabez Group would request backup documentation, including sales invoices to support their accounts receivable. Whenever the Jabez Group would unknowingly request false invoices to sample, employees of USADV

[5] Process taken in order to appraise the value of a company's assets.

would create fraudulent invoices and provide these invoices to the Jabez Group. USADV was able to prevent the Jabez Group from detecting the fraudulent activity that they were conducting.

27. **Lagos** and Aleman-Longoria took large distributions from USADV which largely consisted of the money from the fraudulent scheme. In order to disguise these distributions from the auditors and refrain from reporting these distributions on their financial statements they devised another scheme. Towards the end of the year, they would transfer money that was fraudulently obtained from GECC into Certificates of Deposit (CDs). They would then obtain personal loans using the money in those CDs as collateral. Then, they would use the proceeds from the personal loans to pay back the distributions that they had taken during the year. The following year, they would then use the money in the CD accounts, which was fraudulently obtained to pay off the personal loans in their names.

28. **Lagos** admitted to investigators to double and triple financing a large volume of GPS and Power Units to two to three separate lenders. None of the lenders were aware that the assets were being used as collateral to obtain separate loans. Many of these lenders incurred substantial losses due to this fraudulent financing of assets.

29. In 2009, USADV could no longer make both principle and interest payments on their line of credit. USADV then negotiated the terms of the line of credit to include making interest only payments.

30. Burton, McCumber & Cortes, LLP (BMC), had performed the audit for Golgale Holdings and their subsidiary companies since 2004. The audit for 2008 was much later than normal as Barbosa told BMC that Golgale was not yet ready for the audit. In August 2009, Ben Pena, audit manager for BMC, received the financial documents of Golgale and began their preparation to conduct the audit. BMC required USADV employees, including **Lagos**, Aleman-Longoria and Barbosa to execute "Fraud Questionnaires for Management." **Lagos**, Aleman-Longoria and Barbosa always disclaimed any knowledge of any fraud, falsely certifying on every questionnaire that they had no knowledge of actual fraud and no reason to believe that fraud was otherwise occurring.

31. **Lagos**, Aleman-Longoria and Barbosa had a meeting with their independent auditor, who informed them that they would be sending confirmation letters to USADV customers to confirm accounts receivable balances.

32. On October 27, 2009, **Lagos** and Aleman-Longoria signed Amendment Twelve of the Revolving Loan Agreement on behalf of the Borrowers inducing GECC to increase the amount of the Revolving Loan to the lesser amount of $35,000,000 or 85% of eligible accounts receivable.

33. USADV also employed the consulting services of Curt Friedberg to assess in their financial issues. While Friedberg was at USADV, the owners admitted to the fraud that they had committed.

34. On January 25, 2010, Aleman-Longoria, **Lagos** and Friedberg had a meeting with GECC employees and various other individuals. During this meeting, Friedberg explained the fraudulent scheme that occurred at USADV. Aleman-Longoria and **Lagos** finally admitted to GE Capital the fraudulent activity including the overstatement of accounts receivables; which was later verified by GECC along with outside consultants. **Lagos** and Aleman-Longoria stated that the reason they committed the fraud was in order to pay for the buyout of George Gomez,[6] rising fuel costs and also to pay for their extravagant spending habits.

35. Aleman-Longoria admitted to investigators that even after the fraud had been discovered, he cashed a USADV dividend check from the Loves Gas Station for approximately $18,000-$20,000, in order to pay for his daughter's wedding.

36. On February 2, 2010, USADV including its parent company declared bankruptcy. On February 3, 2010, **Lagos** withdrew approximately $251,000 from his savings account at Highway District 21 Federal Credit Union, which he never turned over during the USADV bankruptcy proceedings. Two checks were issued to **Lagos** on this date, one in the amount of $40,000 and another in the amount of $211,000; to-

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[6] George Gomez served as the sole investor and provided $1.2 million for the establishment of USADV. In January 2008, Gomez approached Lagos about being kept in the dark about business decisions with USADV. Gomez wanted out of the business and agreed to sell his interest for $1.9 million and a 19 acre piece of land. Gomez officially left the company in March 2008.

taling $251,000. This money originated from six surrendered Certificates of Deposit accounts at the Highway District 21 Federal Credit Union. Five of these six Certificate of Deposit Accounts, which had a total purchase price of $230,586.35, were not purchased with **Lagos'** personal funds, but purchased with funds belonging to USA Carriers or its related companies.

37. From Spring 2009 through Spring 2010, **Lagos** received approximately $4.3M and Aleman-Longoria received approximately $2.5M.

38. On February 4, 2010, **Lagos** deposited two cashier's checks into his personal checking account at Texas Community Bank, at the Highway District 21 Federal Credit Union. One in the amount of $211,000 and another check in the amount of $40,000 ($30,000 of this amount was withdrawn as cash). On the same date, **Lagos** wrote a check in the amount of $75,000 from his Texas Community Bank account and made it payable to Hasdorff & Covery for attorney fees.

39. On February 11, 2010, **Lagos** wrote a check payable to cash in the amount of $95,000. On February 16, 2010, **Lagos** wrote a check payable to cash in the amount of $45,000.

Docket No. 7:10CV00077

40. On March 16, 2010, a civil complaint was filed by GECC against **Lagos** and Aleman-Longoria in the Southern District of Texas, McAllen Division, after they defaulted on the repayment, performance and terms of the loans advanced to USADV (**Lagos** and Aleman-Longoria agreed to personally guarantee

the debt of USADV and other subsidiary corporations of Golagale LLC). The case was assigned to Judge Hinojosa and was resolved by way of an Agreed Judgment which was entered as a final judgment on August 16, 2010. GECC obtained a final, non-appealable, Agreed Judgment against both **Lagos** and Aleman-Longoria for the principal amount of $33,555,506, excluding interest and which was set at a non-default rate of 7% per year. To date, GECC has only received $580,000, which came from the sale of **Lagos'** home.

Relevant Conduct Assessment

41. **Sergio Fernando Lagos** was an owner and Chief Executive Officer of USA Dry Van Logistics LLC (USADV), a subsidiary of Golagale Holdings, LLC. **Lagos** also with Aleman-Longoria entered into a Revolving Loan financing agreement on behalf of USADV with General Electric Capital Corporation (GECC). A line of credit was issued by GECC that was secured by USADV's accounts receivable. USADV began having cash flow issues, at which time, **Lagos** called a meeting with Aleman-Longoria and Barbosa and devised a scheme wherein USADV would fraudulently increase their accounts receivable for the purpose of requesting additional money from the line of credit obtained from GECC. USADV would keep one register for their legitimate accounts receivables and a separate register for their fraudulent accounts receivable. **Lagos** instructed Barbosa to assist in the implementation of the fraudulent scheme and also that he involve other USADV accounting personnel. **Lagos** instructed the accounting staff to put an "S" in front of all of

the fraudulent invoices so that they would keep track of them. Barbosa would often times delay the auditors by one day in order to give the account staff time to prepare the false invoices. **Lagos** instructed Barbosa to assist in the implementation of the fraudulent scheme and also that he involve other USADV accounting personnel. During the scheme, **Lagos** would determine the shortfall in their operating account and then instruct Barbosa on the amount of additional false invoices that would need to be created to obtain additional funds. Barbosa would then instruct and assist the accounting department on how many false invoices to create. The accounting staff was all aware of the fraud they were committing. As a result of the fraudulent scheme, GECC incurred a loss of $26,254,781. **Lagos** is deemed an organizer within the conspiracy.

Victim Impact

42. Pursuant to the Mandatory Victims Restitution Act of 1996, the total restitution amount identified is $26,254,781, due and payable to General Electric Capital Corporation (GECC). However, according to GECC, through the course of bankruptcy acquisitions, as of October 28, 2013, the amount owed GECC was $11,760,666.84.

Legal Department

GE Capital – Transportation Finance

1010 Thomas Edison Blvd. SW

Cedar Rapids, Iowa 52404-8247

43. GECC has provided a Victim Impact Statement. (see attachment)

Adjustment for Obstruction of Justice

44. The probation officer has no information to suggest that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

45. During the presentence interview, the defendant stated he would provide a written statement at a later date, regarding his involvement in the offense. As of the time of this writing, no statement has been received. However, it is noted that the defendant pled guilty to the offense.

Offense Level Computation

46. In light of the Supreme Court opinion in United States v. Booker, 125 S.Ct. 738 (2005), the federal Sentencing Guidelines are advisory. According to Booker, while not bound by the Guidelines, the Court must consult the Guidelines and take them into account when sentencing.

47. Due to the multiple counts of conviction, the grouping rules contained in U.S.S.G., Chapter Three, part D, are applicable. Counts involving substantially the same harm shall be grouped together into a single group. All counts are grouped pursuant to U.S.S.G. § 3D1.2(d), since the offense level is determined largely on the basis of an aggregate measure of harm, loss or substance or is ongoing or continuous in nature and the offense guidelines is written to cover such behavior. Due to the operation of U.S.S.G. § 1B1.3, the counts result in identical offense levels; therefore, Count 2 will be used to portray the guideline computations set forth below.

48. The 2014 edition of the Guidelines Manual has been used in this case.

Count 2 – Wire fraud.

49. **Base Offense Level:** The United States Sentencing Commission Guideline for violation of 18 U.S.C. § 1343 is founded in U.S.S.G. § 2B1.1 and calls for a base offense level of 7. +7

50. **Specific Offense Characteristic:** Since the loss of $26,254,781, exceeded $20,000,000, but was less than $50,000,000, the offense level is increased by 22 levels pursuant to U.S.S.G. § 2B1.1(b)(1)(L). 22

51. The offense involved the use of sophisticated means; and therefore, pursuant to U.S.S.G. § 2B1.1(b)(10)(C), the offense level is increased by 2. +2

52. **Victim Related Adjustments:**

53. **Adjustments for Role in the Offense:** Pursuant to U.S.S.G. § 3B1.1(a), the offense level is increased by four, as the defendant is deemed an organizer/leader or criminal activity that involved five or more participants or was otherwise extensive. +4

54. **Adjustments for Obstruction of Justice:** None. 0

55. **Adjustment Offense Level (Subtotal):** 35

56. **Adjustment for Acceptance of Responsibility:** None. 0

57. **Total Offense Level:** 35

58. **Chapter Four Enhancements:** None. 0

59. **Total Offense Level:** 35

Offense Behavior Not part of Relevant Conduct

Activity After Initial Bankruptcy

60. On October 5, 2010, North American Xpress Carriers, LLC, was incorporated in the State of Texas and Frank Flores was listed as the sole owner of the corporation. Flores is **Lagos'** ex-brother-in-law. On January 20, 2011, North American Xpress Carriers, LLC, changed its name to Americorp Xpress Carriers LLC.

61. A bank teller for First National Bank stated that towards the end of 2010, Frank Flores began making a large amount of structured cash deposits just under $10,000. Frank Flores told the bank teller that he was depositing the cash under the Currency Transaction Report threshold (CTR), with the intention of avoiding CTRs being filed on him. Frank Flores also stated that he was obtaining the money from his ex-brother-in-law, Sergio **Lagos**, who was his business partner. The bank teller recalls meeting **Lagos** when he came into the bank to inquire about purchasing a repossessed home. The bank teller stated that Frank Flores was transferring the money to Texas Community Bank in order to obtain a line of credit for the new trucking business. Frank Flores told the teller that he could get a better rate with another bank and which is why he did not use First National Bank.

62. The bank teller stated that in 2011 Flores, deposited a little under $100,000 of cash into his account. The teller stated that the cash was in straps and stamped by JPMorgan Chase Bank. Frank Flores told the bank teller that he obtained the money from the sale

of scraped steel and that he received a check that was written from an account at JPMorgan Chase Bank. Flores stated he cashed the check at JPMorgan Chase Bank and did not have any issues with the check bouncing. Once Flores cashed the check, he brought the cash over to First National Bank to be deposited.

63. Below are a sample cash deposits that were made into Frank Flores Account # 34001433 at First National Bank between October 7, 2010 and February 15, 2011:

| Date | | | Amount |
|---|---|---|---|
| October 7, 2010 | Cash In | Deposit | $9,900.00 |
| October 8, 2010 | Cash In | Deposit | $9,900.00 |
| October 12, 2010 | Cash In | Deposit | $9,900.00 |
| October 13, 2010 | Cash In | Deposit | $9,900.00 |
| October 18, 2010 | Cash In | Deposit | $9,900.00 |
| December 17, 2010 | Cash In | Deposit | $9,900.00 |
| December 22, 2010 | Cash In | Deposit | $9,900.00 |
| December 23, 2010 | Cash In | Deposit | $9,900.00 |
| December 24, 2010 | Cash In | Deposit | $9,900.00 |
| December 28, 2010 | Cash In | Deposit | $9,900.00 |
| December 29, 2010 | Cash In | Deposit | $9,800.00 |
| December 30, 2010 | Cash In | Deposit | $9,800.00 |
| January 3, 2011 | Cash In | Deposit | $9,900.00 |
| January 4, 2011 | Cash In | Deposit | $9,700.00 |
| January 5, 2011 | Cash In | Deposit | $9,800.00 |
| January 6, 2011 | Cash In | Deposit | $3,300.00 |
| January 31, 2011 | Cash In | Deposit | $8,550.00 |
| February 15, 2011 | Cash In | Deposit | $93,156.00 |
| **Total** | | | **$262,906.00** |

64. Leticia Rodriguez, who has been dating Frank Flores on and off since 2002, stated that approximately two years ago, Flores and **Lagos** started up Americorp Xpress Carriers, LLC.

65. Rodriguez stated that towards the end of 2010 or the beginning of 2011, **Lagos** contacted Frank Flores via the phone and inquired as to whether or not he was interested in starting up a trucking company with him. She stated that Frank Flores agreed to do so.

66. Rodriguez stated that **Lagos** had approximately five to seven Rolex watches which he wanted to sell in order to obtain his portion of the startup money for the new trucking company. Rodriguez stated that she had a friend by the name of John Van Ramshorst who was interested in purchasing the watches. She stated that she brought the watches to her job at Edwards Abstract and John Van Ramshorst had an appraiser meet her there to appraise the watches. She stated that several days later, John Van Ramshorst purchased the watches for approximately $120,000 in cash. She stated that John Van Ramshorst brought the cash to her job at Edwards Abstract and she exchanged the watches for the cash outside the building. Rodriguez stated that Frank Flores shortly thereafter picked up the money at her job and she believes he took it straight to the bank. She stated that this money was used to start up the trucking company. Rodriguez stated that John Van Ramshorst recently passed away at the age of eighty two and she believes his family has the watches.

67. Rodriguez stated that Flores obtained his share of the money to start up the trucking company from a bank loan.

68. Rodriguez stated that **Lagos** and Frank Flores used the money from the watches and the loan to purchase approximately 10 tractors to start up the business. Rodriguez stated that **Lagos'** first wife did not provide any money to start up the trucking company.

69. Agents interviewed Alma Van Ramshorst, who was the surviving spouse of John Van Ramshorst regarding the whereabouts of the Rolex watches that were possibly purchased by her late husband. Agents subsequently received a call from John Lopez who was calling on behalf of Alma Van Ramshorst. Lopez stated that Alma Van Ramshorst had several watches that her husband purchased which consisted of three Rolex watches and two Breitling watches. Agents physically verified the existence of these watches and took pictures of the watches. A description of these watches is listed below:

*Brietling K13356 Chronographe Certifie Chronometre Automatic N 0638, 2539147*

*Breitling for Bentley Motors, Edition Limitte a 50 Exemplaires 5 of 50, 30 Second Chronograph, 5/50, H25363, 2126767*

*Rolex – (Platinum) 18946/D810823, 3155, 1296999*

*Rolex – (Blue Face) 118238/D403843 3155, 3 9783471*

*Rolex – (Gold) 18948/Z395058, 72748 Band 18kt, Mumt 3155, 1550094*

70. Further investigation by agents revealed that **Lagos** purchased two of the above watches from Tourneau – Las Vegas, 3500 Las Vegas Blvd. #F07, Las Vegas, NV 89109. On August 8, 2007, **Lagos** purchased the above Breitling for Bentley Motors, Edition Limitte a 50 Exemplaires 5 of 50 for $100,207.50. On September 11, 2007, **Lagos** purchased the above Rolex – (Platinum) 18946/D810823 for $74,700.00.

71. Ivonne Gallur, who is **Lagos'** second ex-wife, stated that while **Lagos** was an owner at USADV, he purchased assets in Mexico, including trailers which were put under other individuals' names. Some assets were purchased under Barbosa's name in the United States. Gallur stated that **Lagos** would always put assets in other individual's names.

72. Gallur was told by **Lagos** that he owned a trucking company that was not in his name, but rather under Frank Flores' name. The trucking company had approximately 120 trucks and approximately 300 trailers. She further stated that **Lagos** told her that he did not want to put any property under his name due to the fact that it would be taken away from him. Gallur stated that **Lagos** has a ranch that belonged to him; however, it was in an unknown person's name. She further stated that **Lagos** was going to build a residence on this property once all of his legal issues were done.

73. Gallur stated that **Lagos** lent his brother, Pedro **Lagos**, approximately $50,000 from his new trucking company.

74. Gallur stated that **Lagos** owns two Harley Davidson motorcycles that were kept at the new trucking company's location. She also stated that **Lagos** also had a Mercedes however; it was not under his name.

75. Gallur provided agents with a recorded conversation in which she stated that **Lagos** told her that Americorp Xpress Carriers actually belongs to him; however, it was in Frank Flores' name.

76. Noe Garcia, an accountant for Americorp Xpress Carriers and former accountant for USADV stated that Norma Flores (an ex-wife of **Lagos**) provided a $100,000 loan to start Americorp Xpress Carriers and William Horine provided another $100,000 loan to start the business. Garcia further stated that Frank Flores did not use any of his personal money to start up the business. Garcia stated that he knew that Frank Flores sold the vehicles in his salvage yard but did not believe any of this money was used to start up Americorp Xpress Carriers. Garcia stated that the loan from Norma Flores was paid back in March of 2012 and that Norma Flores lent Americorp another $100,000 in July or August of 2012 which has also been repaid.

77. Garcia stated that **Lagos** was a current employee of Americorp Xpress Carriers, however he went on to state that **Lagos** is in charge of the operations of Americorp Xpress Carriers and also makes the financial decisions for the company. He stated **Lagos** is being paid $500 a week and has only begun to receive that salary starting in October. Garcia was asked if **Lagos** receives any other salary or distribution from Americorp Xpress Carriers. Garcia

then stated that Frank Flores receives a management fee of $3,500, a week and that **Lagos** receives an unknown portion of that management fee. Garcia further stated that **Lagos** drives a S500 Mercedes Benz that is under Norma Flores' name and that Norma Flores pays bills for **Lagos**. Garcia stated that **Lagos'** brother pays for his apartment that he is renting.

78. During an interview, **Lagos** stated that he was an employee of Americorp Xpress Carriers and assisted in starting up the company. He stated that his ex-wife, Norma Flores lent Frank Flores $100,000 to start up the company and Frank Flores used $450,000 of his own money to start up the company.

79. Frank Flores was interviewed and stated that he began Americorp Xpress Carriers LLC, in the later part of 2010. He further stated that he purchased six trucks in October of 2010 and another six trucks in January of 2011 for approximately $25,700 each.

80. Frank Flores stated that he started up Americorp Xpress Carriers, LLC, with the help of Sergio **Lagos** who was hired as a consultant. He stated that **Lagos** had no ownership in the company and was only paid $500 a week in cash. Frank Flores further stated that **Lagos** has never contributed any money to the company and has no financial control over the company.

81. Frank Flores stated that the trucking company was started up using $100,000 of his personal money and $50,000 from his sister, Norma Flores.

82. Frank Flores was asked if he ever deposited large amounts of cash into his bank accounts and he stated

that he only once deposited cash into his bank account. Frank Flores was asked several times if he ever deposited just under $10,000 to avoid the filing Currency Transaction Reports, and he replied that he never did. Frank Flores stated that the only time that he ever deposited a large amount of cash into his bank account was when he sold all of the vehicles he had in his salvage yard. He stated that he was paid in cash when he sold the vehicles for scrap. He was questioned as to whether he may have been paid with a check for the scrap metal instead of cash and Frank Flores insisted that he was paid in cash and then deposited into the bank. Frank Flores further stated that he was paid $300 per ton for the scrap metal and then deposited this cash into his bank account.

83. Frank Flores stated that **Lagos** has no financial control over Americorp Xpress Carriers.

84. Norma Flores was interviewed and stated that she divorced **Lagos** in 2004, however; they actually separated in 2003. Norma Flores was asked what assets she owned once her divorce was finalized and she stated that she only owned two vehicles (a 2002 Cadillac and a 2003 Chevrolet Tahoe), a residence located at 2917 Las Cruces Drive, Edinburg, Texas; a $6,000 in a retirement account from the City of McAllen and she had been awarded the Rapid Tax Service business from **Lagos**. Norma Flores further stated that she was awarded approximately $3,700 a month in alimony and $1,800 in child support.

85. Norma Flores was asked if **Lagos** owed her any money in alimony or child support and she stated

that he owed her approximately $30,000 - $40,000 in alimony and approximately $20,000 in child support.

86. Agents asked Norma Flores what the balance was on her mortgage when she got divorced and she was unsure. However, she stated that the house was purchased in 1997 or 1998 for approximately $120,000 and only monthly payments were made on the mortgage. There was also no additional principle payments made on the mortgage before the divorce. She further stated that **Lagos** paid off the mortgage after the divorce; however, she does not recall when he did so.

87. Agents asked if she has ever received any money from **Lagos** besides the alimony and child support that was owed to her and she said stated she had not. Norma Flores subsequently stated that **Lagos** owed her approximately $40,000 from the divorce and she only collected about $15,000 after attorney fees were deducted from the amount.

88. Agents also asked Norma Flores if she has ever loaned or given any money to **Lagos**. She stated that she is currently paying **Lagos'** rent of $600 a month, paying his internet and insurance. She further stated that she gave him $5,000 for an IRS audit and also once paid to help him pay for a move. She stated that she has never loaned or paid **Lagos** any other large amounts of money.

89. Norma Flores was asked by agents what were her sources of income since her divorce and she stated that she only has received income from Rapid Tax Service. She stated that the income from Rapid Tax Services fluctuates, however her most recent K-1

from Rapid Tax Service was for approximately $30,000 and her last W-2 stated that she earned approximately $90,000. She further stated that she has not received any inheritances or other money since her divorce in 2004. She then stated that she owns three trucks which are leased to her brother's company. She stated that she earns $5,000 a month on each truck; however she has to make loan payments on all three trucks which are automatically deducted from her personal account. She stated that she does not recall what her loan payments are since they are automatically taken out of her account. However, she purchased each truck for approximately $33,000.

90. Norma Flores stated that her brother's name was Frank Flores and the name of his company is Americorp Xpress Carriers. She stated that he was the sole owner of the company and he has no other business partners. She stated that she loaned the company $100,000 of her personal money and then took out an additional loan in the amount of $100,000 under Rapid Tax Services name to loan the company. She further stated none of these loans have been repaid to date.

91. Norma Flores stated that before her brother started Americorp Xpress Carriers, he owned a salvage yard which was previous owned by their father. She stated her brother used her loan and his money to start up Americorp Xpress Carriers, however she is unaware of how much money he put into the company to start it up. She stated that **Lagos** did not put any of his money into the company.

92. Norma Flores stated that **Lagos** had a Mercedes that he asked her to put it in her name. She further stated that Americorp Xpress Carriers is currently paying the monthly payments for the Mercedes.

93. Agents asked Norma Flores why was she still helping her ex-husband **Lagos** out and she said he was a very successful person and she believed he would make money again. She further stated that she believed he would be able to pay her back the money that he owed. Agents confirmed that Norma Flores had a 2012, S550 Mercedes in her name that had an estimated purchase cost of $90,000.

94. Wendy Sanjur, **Lagos'** current wife stated that **Lagos** left her in November of 2014. She stated that **Lagos** was paying her rent, cable, utilities and also paid her $500 a week for child support for their daughter. **Lagos** was in the process of getting married to Diana Sanchez and residing at 801 S. Jay Drive in Palmview, Texas. He currently has a Mercedes Benz, a Jeep, jet skis and a brand new ATV. Sanjur stated that **Lagos** had a lot of money; however, she does not know where he was keeping the money. She stated that she had previously made a trip up to San Antonio, Texas, with **Lagos** and he purchased two purses for her which cost approximately $10,000. Sanjur stated that **Lagos** utilizes a Chase Credit Card which is in his name.

95. On May 31, 2014 a SOI (Source of Information) that stated that Sergio **Lagos** was the true owner of Americorp Xpress Carriers, LLC, and the company was put in the name of Frank Flores since **Lagos** could potentially be going to jail. Flores has little to

no authority in decision making at Americorp Xpress Carriers, LLC.

96. SOI stated that approximately 60% of Americorp Xpress Carriers, LLC business is from Ceva Logistics. The SOI stated that Simon Ruiz, was an employee and branch manager for Ceva Logistics and that Americorp Xpress Carriers, LLC bribed him to obtain business from Ceva Logistics. SOI stated that Ceva Logistics was unaware that Ruiz was receiving these bribes. Ruiz also set up a front company by the name of USA Linehaul whom Americorp Xpress Carriers wrote checks to in order to disguise these payments.

97. The SOI stated that Ruiz as currently selling his residence to **Lagos** under the table so that there was no record of **Lagos** owning the property. The residence is located at Mayberry and Jay Drive. Oscar Barbosa has two 4-wheelers which were being stored at the residence; however, since Barbosa is no longer speaking with **Lagos**, the four wheelers are still at the residence.

98. Pedro **Lagos**, who is Sergio **Lagos'** brother, owns four trucks in Americorp Xpress Carriers, LLC Fleet.

99. **Lagos** has a Harley Davidson, a Ninja Motor Cycle and a Brute Force four wheeler which he was trying to sell, which are located at his town home located off of 2nd Street in McAllen, TX. Lagos also spent approximately $40,000 remodeling this town home. The town home was not in **Lagos'** name, so he/she is unaware on why he spent all this money renovating this town home.

100. According to the case agent, Americorp Xpress Carriers wrote checks out to individuals for the sole purpose of cashing the checks and giving the cash back to Americorp Xpress Carriers, LLC. For cashing these checks, Americorp Express Carriers, LLC gave these individuals approximately $100. There was no legitimate purpose for doing so. **Lagos** would often request Noe Garcia to obtain large amounts of cash and bring it to him.

101. The SOI stated that Texas Community Bank assisted individuals in cashing checks and depositing cash from Americorp, Xpress, Carriers, LLC, without proper identification.

102. The SOI stated that **Lagos** previously forced employees of Americorp Xpress Carriers, LLC to provide statement of affidavits that the marriage between **Lagos** and his current wife Wendy was a valid marriage.

103. On July 21, 2014, Victor Ramon stated that he was previously employed by Americorp Xpress Carriers, LLC. Ramon stated that he would cash checks for **Lagos**. He clarified his statement by stating that **Lagos** would instruct Noe Garcia to issue checks in even dollar amounts to him and he would take these checks to Texas Community Bank to cash the checks. Once he cashed the checks, he would almost always give the cash directly to **Lagos**. On some occasions, he would give the cash to Noe Garcia due to the fact that **Lagos** was not available. Noe Garcia would in turn give the cash to **Lagos**. Ramon stated that he possible cashed approximately $40,000 worth of checks for **Lagos** within a thirteen month

period. He would never ask **Lagos** why he was directed to cash the checks, since **Lagos** is the boss.

104. **Lagos** had told him on numerous occasions that he was the individual who started up Americorp. Ramon stated that he had been to several parties which **Lagos** paid for. He and other employees of Americorp who also went to gentlemen clubs with **Lagos** and **Lagos** paid for all of them to go including the cost of their drinks.

105. On February 17, 2015, Noe Garcia was interviewed for a second time. Agents asked Garcia if he ever gave checks to employees of Americorp Xpress Carriers, LLC for the purpose of cashing the checks and giving the cash to Sergio **Lagos**. Garcia stated that in the past couple months; employees were given approximately $5,000 to $10,000 worth of checks to cash and return the cash to **Lagos**. Garcia stated that an employee's salary check would include their name and address on the check. However if the purpose of the check was to be cashed, the check would not have the employee's address on the check. Garcia advised agents that he was unsure about what the weekly or monthly amount of checks that were cashed by employees for the purpose of giving the cash back to **Lagos**. However, he only knew of approximately $5,000 to $10,000 worth of checks for the past couple of months. Agents informed Garcia that this had been going on since 2013 and Garcia did not deny the allegations.

106. Garcia was told by agents that some employees were receiving regular weekly payroll checks and then on random dates, they receive checks for large even dollar amounts. Employees stated that they

cashed these checks for **Lagos**. Garcia did not deny this statement however; he, stated that he did not know the purpose of all checks written to employees. Garcia stated that **Lagos** and/or Flores would often tell him to write checks to employees which were not their regular payroll checks. He stated that they would often give him invoices for the amount to write the check for.

107. Garcia stated that Frank Flores would give a certain amount of his distributions to **Lagos**; however he was uncertain on how much he was giving him.

108. Garcia stated that he was almost always the individual who writes checks for the company; however Flores signs the checks after he writes them.

109. Garcia stated that **Lagos** was barely involved in the company. He stated that Flores just keeps **Lagos** afloat financially.

* * * * *

**PART D. SENTENCING OPTIONS**

* * * * *

Restitution

157. **Statutory Provisions:** Pursuant to 18 U.S.C. § 3663A(c)(1) a conviction for any offense that is a crime of violence as defined in 18 U.S.C. § 16; an offense against property, including any offense committed by fraud or deceit; or an offense relating to tampering with consumer products; and the offense involves an identifiable victim or victims who have suffered physical injury or pecuniary loss, the Court

shall order, in addition to any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate. The Court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

158. Pursuant to 18 U.S.C. § 3663A(c)(3), only in the case of an offense against property, including any offense committed by fraud or deceit, is restitution not mandatory, but only if the Court finds on the record that (1) the number of identifiable victims is so large as to make restitution impracticable or; (2) determining complex issues of fact related to the cause or amount of the victim's losses would unduly complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

159. In each order of restitution, the Court shall order restitution to each victim in the full amount of each victim's losses as determined by the Court and without consideration of the economic circumstances of the defendant, pursuant to 18 U.S.C. § 3664(f)(1)(A). However, in determining the manner in which, and the schedule according to which, the restitution is to be paid, the Court shall consider the financial resources and assets of the defendant, including whether any are jointly controlled; projected earnings and other income of the defendant; and any financial obligations of the defendant, including obligations to dependents, pursuant to 18 U.S.C. § 3664(f)(1)(B).

160. Restitution in the total amount of $11,760,666.84, due and payable to General Electric Capital Corporation (GECC), Legal Department, GE Capital-Transportation Finance, 1010 Thomas Edison Blvd, SW, Cedar Rapids, Iowa 5204-8247.

161. Guideline Provisions: In accordance with the provisions of U.S.S.G. § 5E1.1, restitution shall be ordered. A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments or a combination of payments at specified intervals and in-kind payments.

162. The Court may direct the defendant to make nominal periodic payments if the Court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amounts of restitution order and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

163. Pursuant to U.S.S.G. § 5B1.3(a)(6) (Mandatory Conditions of Probation) and § 5D1.3(a)(6) (Mandatory Conditions of Supervised Release), payment of restitution shall be a condition of supervision.

Money Judgement

164. The Indictment notifies all defendants that upon conviction, a money judgment may be imposed equal to the total value of property subject to forfeiture, for which the defendant may be jointly and severally liable. That amount is estimated to be, but is not limited to, approximately $26,254,781.

* * * * *

Respectfully submitted,

SEAN HARMON,
Acting Chief United States Probation Officer

By: Hugo E. Mejia
United States Probation Officer

Approved:

Javier Garcia, Supervising
United States Probation Officer
Date: July 10, 2015

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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Docket No. 4:13CR00554-001

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UNITED STATES

v.

SERGIO FERNANDO LAGOS

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Filed: October 29, 2015

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**ADDENDUM TO THE PRESENTENCE REPORT**

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The probation officer certifies that the Presentence Report (PSR), including revisions, has been made available to the defendant, his attorney, and the counsel for the Government, and that the Addendum fairly states any objections they have made. The original PSR has been available since July 10, 2015.

**OBJECTIONS**

**BY THE GOVERNMENT**

The PSR was electronically disclosed to counsel for the Government on July 10, 2015. On August 7, 2015, counsel for the Government filed an objection to the Presentence Report. On October 26, 2015, counsel for the Government filed Modified Objections to the Presentence Investigation Report and Request for Restitution. The probation officer will respond to the Modified Objections summarized below.

I. **The Amount of Loss Should be Offset by Disposition of Collateral**

Based on the defendants' fraudulent scheme, GE Capital was induced to loan the defendants' company $35,000,000.00. This represents the intended loss caused in this case. However, the defendants' pledged collateral to obtain this line of credit. The financing agreement executed between the defendants and GE Capital provided that the loan was secured by collateral. The agreement defined "collateral" as "all present and future accounts; chattel paper, instruments; general intangibles; documents; all assets including, without limitation; inventory, equipment of every kind and description; furniture and fixtures; deposit accounts; money; investment property; letters of credit; notes; tax refund and insurance proceeds." GE Capital recovered monies from the disposition of various collateral, detailed in the original victim impact statement (see Government's Exhibit 1). After recovery of those monies, GE Capital was and is still owed $11,074,047.64, which represents the unsecured principal amount of the loan. This amount does not include interest nor does it include fees for attorney or other expenses. (See Government's Exhibit 2). Therefore the Government submits that the amount of loss for guideline purposes is $11,074,047.64, warranting a 20-level increase, pursuant to U.S.S.G. § 2B1.1(b)(1)(K).

**Response:** In the PSR, the probation officer noted that the $35,000,000.00 line of credit was determined by, and collateralized by, the accounts receivable. This investigation revealed the defendants engaged in a conspiracy to fraudulently inflate the accounts receivable by $26,725,000.00. This uncollateralized amount was determined to be the intended loss. However, the

Government now asserts the agreement for USADV also included all of the company's assets as part of the collateral pledged. The information provided in the investigative materials reflected the defendants made draws on the line of credit totaling in excess of $28,000,000. In the Government's recent filings, the Government asserts the total value of collateral pledged and recovered is over $29,000,000.00. Since the defendants are entitled to a credit for the value of any and all collateral against any loss, this would reflect there was no intended loss. However, the guidelines instruct that loss for purposes of guideline computation is the greater of actual and intended loss. Therefore, based on the information provided by the Government, the loss for guideline calculations should be the actual loss of $11,074,047.64. The Presentence Report is revised via this Addendum to reflect that the defendant should he held accountable for an actual loss amount of $11,074,047.64.

**Base Offense Level:** 2B1.1- 7

**Specific Offense Characteristic:** Since the loss of $11,074,047.64, exceeded $9,500,000, but was less than $25,000,000, the offense level is increased by 20 levels pursuant to U.S.S.G. § 2B1.1(b)(1)(K).

The offense otherwise involved the use of sophisticated means; and therefore, pursuant to U.S.S.G. § 2B1.1(b)(10)(C), the offense level is increased by 2.

**Adjustment for Role in the Offense:** Pursuant to U.S.S.G. § 3B1.1(a), the offense level is increased

by 4, as the defendant is deemed an organizer/leader of a criminal activity that involved five or more participants or was otherwise extensive.

Based on a Total Offense Level of 33 and a Criminal History Category of I, the guideline range yields 135 to 168 months and a fine range of $17,500 to $175,000.

This revision is based on November 1, 2015 edition of the Guideline Manual.

## II. Restitution

The Government asserts that GE Capital was required to spend an inordinate amount of resources investigating the extent of the defendants' fraud to determine the amount of actual loss.

a. $ 11,074,047.64 (actual loss to victim: unsecured principal balance on loan)
b. $ 787,897.88 (actual loss to victim: legal fees in bankruptcy proceedings)
c. $ 20,092.32 (forensic expert fees in investigating fraud)
d. $ 1,776,290.24 (legal fees in investigating fraud)
e. $ 2,311,189.29 (consulting fees in investigating fraud)

Therefore, the total amount of restitution should be $15,970,517.37.

**Response:** The probation officer takes no issue and concurs with the Government that the identified cost of investigation incurred by the GE Capital should be included in the total restitution amount. Therefore, the Presentence Report is revised to reflect the total restitution amount of $15,970,517.37, due and payable to GE Capital.

**BY THE DEFENDANT**

The defendant, by way of his attorney, filed the following objections to the PSR on August 10, 2015.

**Objection #1:** The defendant argues that the loss amount should be reduced by the disposition of collateral recovered by General Electric. The total amount that General Electric reported they were owed is $11,760,666.84. The defendant believes that the correct loss amount should be $11,760,666.84 (minus any interest or late charges).

> **Response:** Pursuant to U.S.S.G. § 2B1.1. comment (n.3(D)(i)), *Exclusions from Loss. – Loss shall not include the following: Interest of any kind, finance charges, late fees, penalties, amounts based on an agreement-upon return or rate of return, other similar costs.* The loss amount provided to the probation officer did in fact include interest and late charges. The probation officer has received additional information from the Government which indicates the loss amount owned to GE Capital, less any interest or penalty fees and collateral recovered by GE; such total amount is $11,074,047.64. Therefore, the probation officer concurs with the defense.

**Objection #2:** The defendant argues that General Electric's loss figure of $11,760,666.84, does not discount or explain what part of that amount derives from interest and late charges, which the guidelines explain should not be applied to the total loss figure.

> **Response:** See the probation officer's response to Defendant's Objection #1.

* * * * *

**Objection #7:** The defendant argues that the restitution figure includes late fees and interest.

**Response:** See the probation officer's response to Objection #1.

Respectfully submitted,

LUIS LOPEZ,
Acting Chief United States Probation Officer

/s/ Javier G. Garcia
By: Hugo E. Mejia
United States Probation Officer

Approved:

/s/ Javier G. Garcia
Javier Garcia, Supervising
United States Probation Officer
Date: October 28, 2015

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

No. 4:13-CR-554

**FILED UNDER SEAL**

UNITED STATES OF AMERICA

v.

SERGIO FERNANDO LAGOS

Filed: December 5, 2015

**DEFENDANT'S RESPONSE TO THE GOVERNMENT'S PRESENTENCE INVESTIGATION REPORT OBJECTIONS AND RESPONSE TO THE ADDENDUM TO THE PRESENTENCE INVESTIGATION REPORT**

Defendant Sergio Lagos files this Response both the PSR Objections of the Government and to the Addendum of the Presentence Investigation Report. This filing is made primarily to narrow the contested issues that the Court will face at sentencing on Monday, December 7, 2015.

**1. The U.S.S.G. § 2B1.1(b)(1) loss objection is resolved.**

The defense objected to the loss amount of $26,254,781 in the PSR because it improperly included in-

terest and failed to offset loss by pledged collateral as required by U.S.S.G. § 2B1.1 cmt. n. 3(E)(ii). Those objections are addressed in the PSR Addendum, which offsets loss by the collateral that General Electric Capital Corporation (GECC) recovered, and does not include lost interest. Lagos does not object to the loss amount of $11,074,047.64. PSR Addendum at 2.

2. **The U.S.S.G. §3B1.1 leader organizer objection is withdrawn.**

The defense withdraws its objection to the four level leader organizer adjustment involving five or more participants.

3. **Acceptance of responsibility points should be given pursuant to U.S.S.G. § 3E1.1.**

Probation has not applied acceptance of responsibility points because Lagos has not submitted an acceptance of responsibility letter. PSR Addendum at 4. On December 4, 2015, counsel sent a signed acceptance of responsibility letter via email to the probation officer. Probation advised counsel to submit the letter to the Court. The defense, therefore, will present an acceptance of responsibility letter singed by Mr. Lagos at sentencing.

Nonetheless, Lagos accepted responsibility for this offense a long time ago. Specifically, on January 25, 2010, Lagos and codefendants Jim Aleman and Oscar Barbosa personally met with GECC representatives and explained that they had been inflating their accounts to increase the USADV borrowing base. The next day, Lagos and Barbosa explained to GECC in detail how the fraud was committed. This was all long before the government was ever involved in this case.

Memoranda of interview of Oscar Barbosa and Sergio Lagos show that Lagos spearheaded the idea for the three to disclose this conduct to GECC. The memoranda further show that Jim Aleman, at least initially, resisted going to GECC and wanted to continue the fraud, but Lagos insisted that it be disclosed.

To refuse acceptance of responsibility points to Lagos when he willingly disclosed this fraud to GECC would be counterproductive in a system of justice that encourages individuals to step forward and admit to criminal conduct on their own. In fact, it would run contrary to the norms of society and what most children are taught early in life: If you break a rule, be honest and own up to it. Lagos owned up to his criminal conduct early on. He explained it in detail to GECC, before the government was ever involved. That honesty should not be ignored; it should be rewarded.

**4. Objections to paragraphs 60 to 109.**

Lagos maintains his objections to paragraphs 60 through 109, which are identified by the PSR as, "offense behavior not part of relevant conduct." PSR at pg. 14. Lagos will address these allegations to the extent that they are of concern to the Court at sentencing.

**5. Restitution—attorney's fees and other "recovery losses" cannot be counted under the MVRA.**

Although the § 2B1.1 loss issues have been resolved, restitution has not. In addition to the 11,074,047.64 in actual losses, the government is seeking losses incurred in seeking to recover property ("recovery losses") for GECC in the amounts of:

a. $787,897.88, for legal fees in bankruptcy proceedings.

b. $20,092.32, for forensic expert fees in investigating fraud.
c. $1,776,290.24, for legal fees in investigating fraud.
d. $2,311,189.29, for consulting fees in investigating fraud.

*See* PSR Addendum at 2. Inclusion of these is improper.

First, Lagos and his two co-defendants gave this case on a silver platter to GECC and ultimately to the government, by confessing to and explaining their accounting practices in detail in January of 2010. The notion that GECC was forced to spend over $4 million for nonspecific legal and "investigating" fees (which are only loosely supported by a "victim impact" statement that is not even signed must less sworn to) is preposterous.

Second, the Fifth Circuit has specifically held that losses, including attorney's fees, incurred by a victim attempting to recover stolen property cannot be included in a restitution award under the MVRA. *United States v. Onyiego*, 286 F.3d 249, 256 (5th Cir. 2002). In *Onyiego*, the Fifth Circuit reversed and remanded a restitution order that included attorney's fees that the victim travel agency incurred as a result of lawsuits seeking to collect on stolen airline tickets. *Id.* at 251-52, 256. The court analogized such attorney fees with "recovery losses," which cannot be included in a restitution order. *Id.* at 256 (citing *United States v. Mitchell*, 876 F.2d 1178, 1184 (5th Cir. 1989) ("There is no provision in the restitution Act authorizing restitution for lost income, cost of restoring property to its pre-theft condition, or cost of employing counsel to recover from an insurance company.") It reversed and remanded the trial court's restitution order for including attorney's fees. Lagos objects to inclusion of these recovery losses in the order of restitution.

**6. The proper guideline calculation.**

The correct guideline calculation in this case is:

a. Base offense level ..... 7

b. Loss increase ..... 20

c. Sophisticated means ..... 2

d. Role adjustment ..... 4

e. Acceptance of responsibility ..... -3

Total ..... 30

This calculation correspond with an advisory guideline range of 97 to 121 months.

Respectfully submitted,

*/s/ Dan Cogdell*
Dan Cogdell
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*/s/ Dennis Hester*
J. Dennis Hester
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**CERTIFICATE OF SERVICE**

I certify that I filed a true and correct copy of the foregoing under seal via the ECF system. The system sent a "notice of filing" to all interested parties and a copy was served on the Assistant United States Attorney and United States Probation via email.

*/s/ Dan Cogdell*

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. H-13-554 (1)

**FILED UNDER SEAL**

UNITED STATES OF AMERICA

v.

SERGIO FERNANDO LAGOS

Filed: January 31, 2016

**OPPOSED MOTION TO CALL WITNESSES AT SENTENCING**

NOW COMES the United States of America, through Kenneth Magidson, United States Attorney, and the undersigned Casey MacDonald, Assistant United States Attorney, and files this Opposed Motion to Call Witnesses at Sentencing.

**I. Government's Need to Call Witnesses**

The Government needs to call witnesses to address issues raised in defendant's Response to the Addendum to the Pre-sentence Report and Government's Objections filed on December 5, 2015, wherein the defendant challenges the restitution amounts requested by the victim GE Capital, in victim impact statements. Specifically, the witnesses will address the defense notion that the defend-

ants "gave this case on a silver platter to GECC," the defense description of GE Capital's restitution request as "preposterous," and the defense implication that GE Capital is inventing and/or exaggerating expenses incurred to them as a consequence of the defendant's offense. These factual disputes can only be resolved by testimony from witnesses from GE Capital. Additionally, the Government needs to ensure there is a factual record for appellate purposes. Lastly, the victim has the right to address the Court prior to sentencing to describe the impact of the offense.

The Government also needs introduce evidence in order make an evidentiary record of recently discovered conduct not addressed in the PSR that is also the subject of Government's Objections to the PSR filed as D.E. . Rule 32(i)(2) of the Federal Rules of Criminal Procedure provides that the court may permit parties to introduce evidence on the objections.

Lastly, the Government may seek to adduce testimony from the co-defendants in this case to address other issues raised in the defendant's filings on December 5, 2015, concerning the defendant's surrendering of assets and the nature and circumstances of the offense.

If the defense does not object, the Government is willing to proceed by way of proffer in leiu of testimony from witnesses on issues in dispute in order to expedite the sentencing proceedings.

**II. Potential Witnesses**

Below is a list of potential witnesses the Government may call at sentencing:

1. Kathleen Turland, Executive Counsel—Litigation,

GE Capital
2. Aamir Moinuddin, Vice President, Workout/Loss Mitigation, GE Capital
3. Frank Flores
4. Leticia Rodriguez
5. Oscar Barbosa
6. Jim Aleman
7. Derek Lacina, Special Agent Homeland Security Investigations (case agent)
8. Isabel Barberena, FBI forensic accountant
9. Maria Flores, FBI forfeiture specialist

**III. Conclusion**

For the foregoing reasons, the United States respectfully requests that its Motion to Call Witnesses at Sentencing be Granted.

**RESPECTFULLY SUBMITTED** this 31st day of January, 2016.

By: */s/ Casey N. MacDonald*
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**CERTIFICATE OF CONFERENCE**

I hereby certify that on the 27th day of January, 2016, I conferred with Defendant's attorneys of record, Dan L. Cogdell and Dennis Hester, and they indicate they were **OPPOSED** to this motion.

*s/ Casey N. MacDonald*
Casey N. MacDonald

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Government's Motion to Call Witnesses at Sentencing was served to the Defendant's attorneys of record, Dan L. Cogdell and Dennis Hester, and the U.S. Probation Office by e-mail, on this 31st day of January, 2016.

*s/ Casey N. MacDonald*
Casey N. MacDonald
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. 4:13-CR-554-1

UNITED STATES OF AMERICA

vs.

SERGIO FERNANDO LAGOS

Entered: February 2, 2016

**SEALED ORDER ON OPPOSED MOTION TO CALL WITNESSES AT SENTENCING**

On this day came to be considered the Opposed Motion for to call Witnesses at Sentencing. Upon consideration of the motion, this Court is of the opinion that the Motion should be Granted.

The Court as a matter of policy does not permit the calling of witnesses at sentencing except expert or victim impact statements. All matters for Court consumption are to be submitted in writing no later than the Friday before a Monday sentencing.

It is so **ORDERED.**

SIGNED on this 2nd day of February, 2016.

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

No. 16-1519

# In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE PETITIONER


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## QUESTION PRESENTED

Under the Mandatory Victims Restitution Act (MVRA), courts must order the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4).

In the decision below, the Fifth Circuit held that this provision covers the costs of internal investigations and private expenses in a related bankruptcy case. It so held even though these expenses were "neither required nor requested" by the government, were incurred *outside* the government's official investigation, were incurred *before* the government's investigation began, and failed to resemble "child care" or "transportation" expenses in any conceivable way.

The question presented is:

Whether Section 3663A(b)(4) covers professional costs that were "neither required nor requested" by the government, including costs incurred for the victim's own purposes and unprompted by any official government action.

## TABLE OF CONTENTS

Page

Opinions below ..... 1
Jurisdiction ..... 1
Statutory provisions involved ..... 2
Statement ..... 2
A. Background ..... 2
B. Facts and procedural history ..... 10
Summary of argument ..... 13
Argument ..... 16
I. The MVRA does not authorize restitution for internal investigations and professional fees that were independent of the criminal investigation and unprompted by the government ..... 16
A. Section 3663A(b)(4) does not cover private costs that were unprompted by the government, preceded the criminal investigation, and were incurred for the victim's own purposes ..... 17
1. Section 3663A(b)(4)'s plain text unambiguously excludes independent internal investigations and separate civil litigation from the MVRA ..... 17
2. Section 3663A(b)(4)'s statutory context and history confirm that restitution is unauthorized for these expenses ..... 26
B. The contrary interpretation—embraced by the government and multiple courts of appeals—is unsupportable ..... 29
C. Under the rule of lenity, any statutory ambiguity should be construed against sweeping and unconventional restitution orders ..... 31

Page

Table of contents—continued:

II. The court of appeals erred in applying the MVRA to the undisputed facts of this case ..... 32
Conclusion ..... 34
Appendix — Statutory provisions ..... 1a

## TABLE OF AUTHORITIES

Cases:

*Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158 (2015) ..... 19
*Bearden* v. *Georgia*, 461 U.S. 660 (1983) ..... 9
*Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001) ..... 25
*CSX Trans., Inc.* v. *Ala. Dep't of Revenue*, 562 U.S. 277 (2011) ..... 25
*Dolan* v. *United States*, 560 U.S. 605 (2010) ..... 29
*Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994) ..... 19
*Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576 (2008) ..... 25
*Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) ..... 17
*Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999) ..... 17
*Hughey* v. *United States*, 495 U.S. 411 (1990) ..... 31
*Johnson* v. *Bredesen*, 624 F.3d 742 (6th Cir. 2010) ..... 9
*Jones* v. *United States*, 529 U.S. 848 (2000) ..... 31
*Kucana* v. *Holder*, 558 U.S. 233 (2010) ..... 27
*Loughrin* v. *United States*, 134 S. Ct. 2384 (2014) ..... 22
*Pa. Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998) ..... 20
*Rodriguez* v. *United States*, 480 U.S. 522 (1987) ..... 29

Page

Cases—continued:

*United States* v. *Amato*, 540 F.3d 153 (2d Cir. 2008) ..... 30
*United States* v. *Bahel*, 662 F.3d 610 (2d Cir. 2011) ..... 26
*United States* v. *Cuti*, 778 F.3d 83 (2d Cir. 2014) ..... 22
*United States* v. *Dwyer*, 275 F. App'x 269 (5th Cir. 2008) ..... 11
*United States* v. *Herrera*, 606 F. App'x 748 (5th Cir. 2015) ..... 11
*United States* v. *Hosking*, 567 F.3d 329 (7th Cir. 2009) ..... 26
*United States* v. *Juvenile Female*, 296 F. App'x 547 (9th Cir. 2008) ..... 17
*United States* v. *Mitchell*, 429 F.3d 952 (10th Cir. 2005) ..... 2
*United States* v. *Nucci*, 364 F.3d 419 (2d Cir. 2004) ..... 29
*United States* v. *Phillips*, 477 F.3d 215 (5th Cir. 2007) ..... 11, 12
*United States* v. *Santos*, 553 U.S. 507 (2008) ..... 31
*United States* v. *Skowron*, 529 F. App'x 71 (2d Cir. 2013) ..... 26
*United States* v. *Stennis-Williams*, 557 F.3d 927 (8th Cir. 2009) ..... 31
*United States* v. *Texas*, 507 U.S. 529 (1993) ..... 28, 29
*United States* v. *Tilleras*, 709 F.2d 1088 (6th Cir. 1983) ..... 29
*Yates* v. *United States*, 135 S. Ct. 1074 (2015) ..... 18

Statutes:

Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, § 204(a), 110 Stat. 1227 ..... *passim*
18 U.S.C. 3663A ..... *passim*

Page

Statutes—continued:


18 U.S.C. 3663A(a)(1) ..... 2, 3
18 U.S.C. 3663A(a)(2) ..... 2, 12
18 U.S.C. 3663A(b)(1) ..... 3
18 U.S.C. 3663A(b)(2) ..... 3
18 U.S.C. 3663A(b)(3) ..... 3
18 U.S.C. 3663A(b)(4) ..... *passim*
18 U.S.C. 3663A(c) ..... 2, 3
18 U.S.C. 3663A(c)(1) ..... 2
18 U.S.C. 3663A(c)(1)(A)(ii) ..... 5
18 U.S.C. 3663A(c)(3)(B) ..... 24
Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248 ..... *passim*
18 U.S.C. 3663(a)(1)(A) ..... 3
18 U.S.C. 3663(b)(4) ..... 3, 22, 27
18 U.S.C. 3663(b)(6) ..... 5, 27
1 U.S.C. 1 ..... 30
18 U.S.C. 1593(b)(3) ..... 5
18 U.S.C. 2248(a) ..... 4
18 U.S.C. 2248(b)(1) ..... 4
18 U.S.C. 2248(b)(3)(E) ..... 4, 27
18 U.S.C. 2248(b)(3)(F) ..... 4, 27
18 U.S.C. 2259(a) ..... 27
18 U.S.C. 2259(b)(1) ..... 4
18 U.S.C. 2259(b)(3)(E) ..... 4, 29
18 U.S.C. 2259(b)(3)(F) ..... 4, 29
18 U.S.C. 2327(a) ..... 4
18 U.S.C. 2327(b)(1) ..... 4
18 U.S.C. 2327(b)(3) ..... 4
18 U.S.C. 3613A(a) ..... 9
18 U.S.C. 3664 ..... 6
18 U.S.C. 3664(d)(1) ..... 6
18 U.S.C. 3664(d)(2)(A)(iii) ..... 6
18 U.S.C. 3664(d)(2)(A)(vi) ..... 6
18 U.S.C. 3664(d)(3) ..... 6
21 U.S.C 853 ..... 4

Page

Statutes—continued:

21 U.S.C. 853(q) ..... 4
28 U.S.C. 1254(1) ..... 1
Pub. L. No. 110-326, § 202, 122 Stat. 3560, 3561 (2008) .... 5
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40504, 108 Stat. 1796, 1947 ..... 3
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Missouri Stat. § 155.133.2 ..... 9
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# In the Supreme Court of the United States

No. 16-1519

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 864 F.3d 320. The judgment of the district court (Pet. App. 12a-27a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 17, 2017. The petition for a writ of certiorari was filed on June 15, 2017, and granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant portions of the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, § 204(a), 110 Stat. 1227, codified at 18 U.S.C. 3663A; the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5(a), 96 Stat. 1248, 1253, codified at 18 U.S.C. 3663; and the Violence Against Women Act of 1994, Pub. L. No. 103-322, Tit. IV, Subtit. A, § 40113(b), 108 Stat. 1902, 1907, codified at 18 U.S.C. 2259, are reproduced in the appendix to this petition (App., *infra*, 1a-12a).

## STATEMENT

### A. Background

1. "'Federal courts possess no inherent authority to order restitution, and may only do so as explicitly empowered by statute.'" *United States* v. *Mitchell*, 429 F.3d 952, 961 (10th Cir. 2005) (McConnell, J.) (citation omitted); see, *e.g.*, *United States* v. *Papagno*, 639 F.3d 1093, 1096 (D.C. Cir. 2011). Over the past few decades, Congress has enacted numerous laws providing for restitution in specific circumstances, and each time it has tailored the type of restitution to the offense covered. Here the district court used the MVRA, 18 U.S.C. 3663A, the only statute that authorized restitution for petitioner's crime.

The MVRA was enacted in 1996 to require restitution for "victim[s]" of a wide subset of federal crimes, including certain violent crimes, property offenses, and fraud. See 18 U.S.C. 3663A(a)(1), (c). The Act defines "victim" as "a person directly and proximately harmed as a result of the commission" of any specified offense. 18 U.S.C. 3663A(a)(2). It "appl[ies] in all sentencing proceedings" for "any" covered crime. 18 U.S.C. 3663A(c)(1).

The MVRA makes restitution mandatory where it applies: "the court *shall* order * * * that the defendant make

restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1) (emphasis added). While the order is mandatory, restitution is limited to four categories of eligible expenses: (1) the value of lost property (or the return of that property, if possible); (2) medical and related expenses in cases of bodily injury; (3) "the cost of necessary funeral and related services" in cases of death; and (4) the category at issue here—"lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(1)-(4).

2. As noted, the MVRA is only part of the statutory landscape governing restitution. Congress enacted the MVRA against the backdrop of other laws, which also provide restitution in defined circumstances, and Congress has repeatedly tweaked these restitution statutes to match the expenses with the offense.

The first major development in this area was the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5, 96 Stat. 1248, which authorizes *discretionary* restitution for a large set of crimes not covered by the MVRA. See 18 U.S.C. 3663(a)(1)(A) (listing offenses "other than an offense described in section 3663A(c)"). As enacted, the VWPA enumerated only three categories of eligible expenses, which correspond to the first three categories of relief as the MVRA (18 U.S.C. 3663(b)(1)-(3)). In 1994, Congress added a fourth category to the VWPA: "lost income and necessary child care, transportation, and other expenses *related to* participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663(b)(4) (emphasis added); see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40504, 108 Stat. 1796, 1947.

The same 1994 act that added this fourth category also authorized even broader restitution for narrower sets of crimes involving sexual abuse, sexual exploitation of children, domestic violence, and email and telemarketing fraud. See Pub. L. No. 103-322, § 40113(a)(1), 108 Stat. 1904; *id.* § 40113(b)(1), 108 Stat. 1907; *id.* § 40221(a), 108 Stat. 1928; *id.* § 250002(a)(2), 108 Stat. 2082. Those statutes provide that, "[n]otwithstanding section 3663 or 3663A," the court "shall" order restitution for "the full amount of the victim's losses," which expressly includes all "losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2248(a), (b)(1), (b)(3)(F); accord 18 U.S.C. 2259(a), (b)(1), (b)(3)(F); 18 U.S.C. 2264(a), (b)(1), (b)(3)(F); 18 U.S.C. 2327(a), (b)(1), (b)(3).

When Congress passed the MVRA two years later, it duplicated the first three categories from the VWPA (Section 3663), but limited the fourth category of expenses to those incurred "during" participation in the investigation or prosecution or attendance at related proceedings. 18 U.S.C. 3663A(b)(4). It did not include all "proximate" losses as in the new 1994 statutes.

When Congress has added restitution authority after the MVRA, it has taken various tacks, incorporating the MVRA's or VWPA's provisions or the broad language of the new 1994 provisions, or articulating entirely different expenses. For example, a 1996 act amended 21 U.S.C 853, regarding certain amphetamine and methamphetamine offenses, to require restitution for any injured person "as provided in Section 3663." Pub. L. No. 104-237, § 207, 110 Stat. 3099, 3104; see 21 U.S.C. 853(q). (Section 853(q) was later amended to incorporate Section 3663A instead of Section 3663. See Pub. L. No. 106-310, § 3613(a)(4), 114 Stat. 1101, 1229-1230.) And a 2008 act incorporated Section 3663A in authorizing restitution for certain copy-

right-infringement offenses. 18 U.S.C. 2323(c) (mandating "restitution to any victim of the offense as an offense against property referred to in section 3663A(c)(1)(A)(ii)"); see Pub. L. No. 110-403, § 206(a), 122 Stat. 4256, 4262. By contrast, a 2000 law penalizing human trafficking incorporated not the narrower provisions of Section 3663A but the proximate-loss restitution of 18 U.S.C. 2259. See 18 U.S.C. 1593(b)(3); Pub. L. 106-386, § 112(a)(2), 114 Stat. 1464, 1488.

Then in 2008 Congress further amended the VWPA to extend additional, special relief to victims of identity theft: "the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense." 18 U.S.C. 3663(b)(6); see also Pub. L. No. 110-326, § 202, 122 Stat. 3560, 3561 (2008) (authorizing this addition). That language covers a host of additional expenses including "the costs of an internal investigation," but, again, applies "only to victims of identity theft," not the crimes covered by the MVRA. *Papagno*, 639 F.3d at 1097.

And Congress has indicated its interest in further modifying restitution statutes. The Justice for All Reauthorization Act of 2016 ordered the GAO to study a possible expansion of Sections 3663 and 3663A. Pub. L. No. 114-324, § 2(d), 130 Stat. 1948, 1948-1949. Specifically, Congress wanted to explore, among other possible amendments, the effects of "requir[ing] that the defendant pay to the victim an amount determined by the court to restore the victim to the position he or she would have been in had the defendant not committed the offense." *Id.* § 2(d)(2)(C), 130 Stat. 1949.

To recap, depending on the type of offense, Congress has authorized restitution for: (1) expenses "related to" "participation" in the investigation or prosecution of the offense or "attendance" at related proceedings, for a

broad set of federal crimes; (2) expenses incurred "during" "participation" in the investigation or prosecution of the offense or "attendance" at related proceedings, for a narrower set of crimes; (3) all "proximate" losses, for an even smaller subset of crimes; and (4) expenses incurred to "remediate" the victim's harm, for identity-theft crimes.

3. Congress has also prescribed steps to calculate the amount of restitution. See 18 U.S.C. 3664. Section 3664 leaves wide discretion for the district court and the probation officer yet little opportunity for the defendant (or, indeed, the victim) to meaningfully participate. To start the process, the U.S. Attorney "provide[s] the probation officer with a listing of the amounts subject to restitution." 18 U.S.C. 3664(d)(1). The probation officer notifies the victims and gives them the opportunity "to submit information," including an affidavit, about "the amount of" their losses. 18 U.S.C. 3664(d)(2)(A)(iii), (vi). For the defendant's part, he informs the officer of his "financial resources." 18 U.S.C. 3664(d)(3).

The officer then prepares a presentence report that gives the court "a complete accounting of the losses to each victim." 18 U.S.C. 3664(a). The judge "may require additional documentation or hear testimony," 18 U.S.C. 3664(d)(4), though "[s]eparate restitution hearings are rare," Hon. William M. Acker, Jr., *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After* Southern Union *v.* United States*?*, 64 Ala. L. Rev. 803, 814 (2013). The court may not consider the defendant's "economic circumstances" in determining the amount of restitution, but may consider them in creating a payment schedule. 18 U.S.C. 3664(f)(1)(A), (f)(2). It is unclear if (or how) a victim may dispute the probation officer's recommendation. Acker, *supra*, at 813-814. Moreover, "[i]f the victim's losses are not ascertainable by the

date that is 10 days prior to sentencing," then the court must "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5). "The sequence of events is so unworkable as to be bizarre." Acker, *supra*, at 814.

4. "[B]etween the enactment of the VWPA and the enactment of the MVRA, federal judges ordered restitution in only 20.2% of the cases." Acker, *supra*, at 811. By making restitution mandatory in certain cases, the MVRA has substantially increased the amount of restitution ordered, but has only negligibly improved victims' actual receipt of money.[1] At the end of the U.S.'s 2016 fiscal year, the government had characterized as "uncollectible" fully 91% of the $110 billion in outstanding restitution. U.S. Gen. Accounting Office, GAO-18-203, *Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved* 25 (Feb. 2018) [GAO 2018 Report]. Government officials have long acknowledged that "the greatest impediment to collecting full restitution is the lack of relationship between the amount ordered and its corresponding collectability."[2] The vast majority of offenders simply lack the ability to pay no matter how much

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[1] See, *e.g.*, Letter from Clarence A. Lee, Assoc. Dir., Admin. Office of the U.S. Courts, to Gary T. Engel, Dir. of Fin. Mgmt. and Assurance, U.S. Gen. Accounting Office (June 6, 2001), in U.S. Gen. Accounting Office, GAO-01-664, *Criminal Debt: Oversight And Actions Needed To Address Deficiencies In Collection Processes* 105 [GAO 2001 Report] (explaining that the MVRA "has not resulted in any appreciable increase in compensation to the victims of crime").

[2] Letter from Mary Beth Buchanan, Dir. Executive Office for U.S. Attorneys, U.S. Dep't of Justice, to Gary T. Engel, Dir. Fin. Mgmt. and Assurance, U.S. Gov. Accountability Office (Jan. 13, 2005), in U.S. Gov. Accountability Office, GAO-05-80, *Criminal Debt: Court-ordered Restitution Amounts Far Exceed Likely Collections For The Crime Victims In Selected Financial Fraud Cases* 21 (2005); see, *e.g.*,

they might want to—they are indigent at the time of their offense, their economic situation stagnates during incarceration and does not improve after release, and asset seizures exacerbate the situation. *See* Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Cal. L. Rev. 1687, 1695 (2009); see also, *e.g.*, GAO 2001 Report, *supra*, at 10 (two factors "that have contributed to the significant growth in uncollected criminal debt" are offenders' "minimal earning capacity" and "the assessment of mandatory restitution regardless of the criminal's ability to pay"). Faced with an insurmountable restitution obligation, some offenders give up on even trying to pay. Dickman, *supra*, at 1697. Victims thus rarely receive the amount of restitution they are due.

That failure to pay inflicts multiple costs on all aspects of the criminal-justice system. As to victims, the Judicial Conference has warned that they lose respect for the judicial system when they never receive an expected restitution award. Acker, *supra*, at 835-836. As to the government, a former member of the Administrative Office of the U.S. Courts' Collection Task Force wrote that "the government spends more money trying to collect restitution than the amount it collects." Acker, *supra*, at 833. And collection efforts already suffer from "insufficient staffing resources." OIG Report, *supra*, at 18.

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GAO 2018 Report, *supra*, at 25-26; U.S. DOJ, Office of the Inspector Gen., *Review of the Debt Collection Program of the United States Attorneys' Offices* 14 (June 2015) [OIG Report] ("[T]he growth in uncollectable criminal debt is largely attributable to the MVRA requirement that restitution be imposed for the full amount of the victim's losses, without regard to a defendant's ability to pay."). Another significant cause is insufficient government resources devoted to collections. OIG Report, *supra* at ii-iii.

Finally, while mandatory restitution has produced few concrete positive effects for victims, it is imposing real, negative costs on offenders trying to rehabilitate and satisfy their restitution obligations. First, an unpaid restitution order subjects an offender to the threat of future incarceration. See 18 U.S.C. 3613A(a) (providing for revocation of probation and resentencing if the defendant willfully fails to pay). Second, an offender's failure to satisfy all aspects of his sentence, including paying restitution, often deprives him of certain civil rights under state law. For instance, many states disenfranchise offenders who have unpaid restitution obligations. See, *e.g.*, Allyson Fredericksen & Linnea Lassiter, *Disenfranchised by Debt* 13-14 (Alliance for a Just Society, March 2016); *Johnson* v. *Bredesen*, 624 F.3d 742 (6th Cir. 2010) (approving constitutionality of Tennessee restriction); Ala. Code 1975 § 15-22-36.1; Missouri Stat. § 155.133.2; Tex. Elec. Code § 11.002(a)(4).[3] At least one state, Virginia, suspends the offender's driver's license. Va. Stat Ann. § 46.2-395(B); see also Cortney E. Lollar, *What is Criminal Restitution?*, 94 Iowa L. Rev. 93, 98, 123 (2014) ("The collateral consequences triggered by a failure to pay restitution mirror those that attach to other criminal punishments, including continued disenfranchisement for the inability to pay, preclusion from running for office, threat of further incarceration if someone is unable to prove her failure to pay was not willful, and suspension of one's driver's license."). Third, a large restitution order can provoke recidivism—a desperate probationer might "'use illegal means to acquire funds to pay'" his current order. Acker, *supra*, at 837 (quoting *Bearden* v. *Georgia*, 461 U.S. 660, 670-671 (1983)).

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[3] See https://www.txwp.uscourts.gov/supervision-civil-rights-restoration/index.html.

**B. Facts And Procedural History**

1. a. Petitioner entered a guilty plea to five counts of wire fraud and one count of conspiracy to commit wire fraud. Pet. App. 1a. Petitioner and his co-conspirators owned companies that had a revolving loan with General Electric Capital Corporation (GECC), the relevant "victim" for MVRA purposes. Petitioner admitted that, for two years, "he and his co-conspirators misled GECC about the value of their accounts receivable to induce GECC to increase the amount of the revolving loan and to provide him and his co-defendants with uncollateralized funds." *Id.* at 4a. When the fraud was finally discovered, GECC invested substantial funds in conducting an internal investigation, employing "forensic experts," "lawyers," and "consultants" to determine the "full extent and magnitude" of the scheme. *Ibid.*[4] The fraud also caused petitioner's companies to file for bankruptcy. *Ibid.* GECC incurred additional legal fees participating in those bankruptcy proceedings, where "[t]he bankruptcy court ordered GECC to continue to make advances to the defendants' companies." *Ibid.* The expenses at issue were incurred outside the context of the government's investigation and prosecution of the offense. *Id.* at 4a-5a.

b. In addition to a 97-month sentence of imprisonment, petitioner was ordered to pay restitution under the MVRA. Pet. App. 16a, 23a-26a. As relevant here, the district court, over petitioner's objection, ordered "restitution for the legal, expert, and consulting fees incurred by [GECC] in investigating the fraud" and for GECC's "legal fees from the bankruptcy proceedings caused by the

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[4] "An 'internal investigation' is a term generally used when an organization asks an attorney, investigator, or auditor to look into suspected wrongdoing within the organization and determine, for example, what went wrong, whom to hold accountable, and how to prevent recurrence of the problem." *Papagno*, 639 F.3d at 1099 n.2.

fraud." *Id.* at 1a-2a. As the government noted below, there was ultimately no dispute "over the accuracy of the fees contained in the victim impact statements." C.A. Gov't Br. 10. The sole remaining dispute was the "legal basis" for the restitution award. *Id.* at 38a ("There is no dispute that I see raised as to the numbers. The dispute is as to whether or not they should fit into the categories that they have been placed in.").

The district court ultimately concluded restitution was justified under the MVRA. It ordered restitution of $4,107,467.23 for GECC's investigative fees, and $788,897.88 for its legal fees in the bankruptcy case. Pet. App. 35a, 39a; C.A. Gov't Br. 7 (citing C.A. Rec. 337-342, 345-348).[5]

2. a. The Fifth Circuit affirmed. Pet. App. 1a-6a. The court held that, under the MVRA, the restitution order properly included the costs of GECC's internal investigation and bankruptcy-related expenses. *Id.* at 1a-2a. Rather than analyze the MVRA's text, the court explained that "the scope of restitution under subsection 3663A(b)(4) is controlled" by circuit precedent, which "gave a broad reading to § 3663A(b)(4)." Pet. App. 2a-3a (discussing *United States* v. *Phillips*, 477 F.3d 215 (5th Cir. 2007), *United States* v. *Herrera*, 606 F. App'x 748 (5th Cir. 2015) (per curiam), and *United States* v. *Dwyer*, 275 F. App'x 269 (5th Cir. 2008)). Under that broad reading, the court had previously upheld restitution for "investigative audit costs," costs of internal "investigations" (including both "attorneys' fees" and "accounting fees"), and even other expenses "directly caused" by an offense, such

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[5] The district court also ordered $11,074,047.04 in restitution for the unsecured principal of the loan at the time of petitioner's sentencing, but that aspect of the order is not disputed.

as a university's "costs to notify [potential] victims" of a hacker's "data theft." *Id.* at 2a-3a.

Applying those decisions, the court held that the district court's restitution order was authorized by Section 3663A(b)(4). Pet. App. 4a-5a. It found GECC's private investigation covered because petitioner's scheme "caused GECC to employ forensic experts to secure and preserve electronic data as well as lawyers and consultants to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud." *Id.* at 4a. And it found GECC's bankruptcy-related fees covered because they "were directly caused by [petitioner's] fraud for purposes of restitution." *Ibid.* (citing 18 U.S.C. 3663A(a)(2), (b)(4)). The court nowhere suggested that either set of expenses were justified as requested or required by government investigators or prosecutors.

The court expressly recognized that "the D.C. Circuit takes a narrower view of restitution under subsection 3663A(b)(4)." Pet. App. 4a-5a (citing *United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011)). But it declared itself bound by circuit authority: "Whatever the merits of the contrary reasoning in *Papagno*, this panel is bound by this Court's prior decision in *Phillips* and will follow it here." *Id.* at 5a; see also *id.* at 5a n.2 (asserting that the D.C. Circuit's "restrictive reading" is "unique among the circuits, several of which have come to the opposite conclusion, although without the benefit of *Papagno*'s reasoning") (citing pre-*Papagno* cases from the Second, Sixth, Seventh, Eighth, and Ninth Circuits—but doing so without discussing post-*Papagno* cases from three of those circuits).

b. Judge Higginson concurred. Pet. App. 6a-11a. He joined the court's opinion but wrote separately "to suggest that we may be interpreting Section 3663A(b)(4) too broadly." *Id.* at 6a. Looking to the "'plain language and

structure of the statute,'" he "agree[d] with the D.C. Circuit's persuasive interpretation of the statutory terms." *Id.* at 6a-7a (citing *Papagno*, 639 F.3d at 1098-1101). Under that interpretation, "'participating' in a government investigation does not embrace an internal investigation, 'at least one that has not been required or requested by criminal investigators or prosecutors.'" *Ibid.* (citing *Papagno*, 639 F.3d at 1098-1099).

Judge Higginson also demonstrated that "three additional points support the D.C. Circuit's narrow reading of the statute." Pet. App. 7a. First, employing the "*noscitur a sociis* canon," he found that the relevant expenses here, like all other covered expenses, "must take place within the context of the government's criminal enforcement." *Ibid.* Second, he explained that "a broad reading of Section 3663A(b)(4) is difficult to administer," citing confusion among the circuits adopting the majority position. *Id.* at 7a-10a; see also *id.* at 8a (explaining that the majority approach "requires district courts to undertake difficult analyses," and declaring that "I do not envy district courts faced with this task"). Finally, he noted that "limiting the reach of Section 3663A(b)(4) does not prevent victims from fully recovering their losses": "there are a number of other more explicit and specific criminal restitution provisions that may allow for recovery," and "where criminal restitution statutes fall short, victims may bring their own civil actions to recover their losses." *Id.* at 10a-11a.

## SUMMARY OF ARGUMENT

According to the court of appeals, the MVRA authorizes restitution for unprompted internal investigations and litigation expenses in a bankruptcy case. The court is wrong. Under a proper construction, Section 3663A(b)(4) is limited to the four categories of costs that Congress carefully enumerated in the statute. The relevant section

here—Section 3663A(b)(4)—imposes multiple conditions that the restitution order cannot meet. The court of appeals misconstrued the statute, and its judgment should be reversed.

First, Section 3663(b)(4)'s plain text does not cover the professional costs at issue. The MVRA authorizes restitution for "lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4). That section is textually limited to a *singular* investigation related to a *criminal* offense. It thus applies to government investigations, not private investigations, and is limited to private costs *during participation* in the government's enforcement activities. That means private conduct that merely *assists* the government is not enough, and private expenses incurred *before* the government's "investigation and prosecution" are textually foreclosed. Where, as here, a private party acts on its own, unprompted by the government, it incurs costs that are not "necessary" to the government's efforts, from activity that did not "participate" in the relevant investigation, and based on costs incurred before (not *during*) the relevant period.

Each failing is sufficient to remove the restitution claim from the MVRA. But a more fundamental problem also exists: the only enumerated categories of expenses—"child care" and "transportation"—bear no resemblance at all to a company's extended internal investigation. The enumerated categories—the ones Congress chose to articulate—represent incidental, out-of-pocket costs for meeting with federal agents or testifying at trial; the internal-investigation expenses, by contrast, are *direct* costs for striking out on one's own. They are worlds apart

in scope and magnitude, and they serve different functions and interests. Under settled application of ejusdem generis, those costs fall well outside the "other expenses" contemplated by the statute.

Second, Section 3663A(b)(4)'s context and history support the plain-text interpretation of the provision. The MVRA's language tracks the language of other restitution provisions, but differs in material ways. Those ways *constrict* its scope: at the same time Congress crafted Section 3663A(b)(4)'s core language, it also provided expansive restitution provisions for other crimes—using language that easily encompasses the types of expenses the government seeks to cover here. Because Congress's use of disparate language is presumptively deliberate, the government errs in failing to acknowledge Congress's preference for more constrained terminology in Section 3663A(b)(4).

Third, the contrary interpretation advanced by the government and multiple lower courts is mistaken. These courts ignore the MVRA's plain language and structure; they attempt to gloss over textual limitations based on purported statements of legislative purpose (derived from ambiguous statements in the legislative history); and they confuse statutory restrictions on who is *eligible* for restitution for the standards setting out *eligible recovery* for those entitled to collect.

In any event, while Section 3663A's plain text, context, and history make this a straightforward case, the rule of lenity would tip the scales in petitioner's favor were there any ambiguity left to construe.

The court of appeals applied an incorrect interpretation of the MVRA, and the restitution order cannot stand under a proper construction. The judgment below should be reversed.

## ARGUMENT

### I. THE MVRA DOES NOT AUTHORIZE RESTITUTION FOR INTERNAL INVESTIGATIONS AND PROFESSIONAL FEES THAT WERE INDEPENDENT OF THE CRIMINAL INVESTIGATION AND UNPROMPTED BY THE GOVERNMENT

Under the MVRA, Congress authorized restitution for "lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4).

In the decision below, the court of appeals read this language to cover the costs of private internal investigations, even if those investigations were unprompted by the government, conducted for a corporation's own purposes, and conducted independent of the criminal investigation—indeed, conducted *before* the criminal investigation even began. And the court likewise interpreted the MVRA to authorize professional fees in a bankruptcy case that also had nothing to do with the government's criminal enforcement—simply because the crime supposedly "caused" the bankruptcy.

The court of appeals was wrong. Section 3663A(b)(4)'s plain text, context, and history establish that unprompted internal investigations and professional fees are excluded from the MVRA. The contrary decision below cannot be squared with the language or logic of the controlling statute, or Congress's broader statutory scheme for restitution.

### A. Section 3663A(b)(4) Does Not Cover Private Costs That Were Unprompted By The Government, Preceded The Criminal Investigation, And Were Incurred For The Victim's Own Purposes

#### 1. Section 3663A(b)(4)'s plain text unambiguously excludes independent internal investigations and separate civil litigation from the MVRA

The proper disposition of this case begins and ends with the statutory text. See, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). Section 3663A(b)(4)'s plain language confirms that unprompted internal investigations and private professional costs are not covered. That unambiguous text imposes multiple conditions to qualify for restitution, and unprompted internal investigations and professional fees satisfy none of those conditions.

a. 1. First, it is insufficient to show that expenses were incurred while participating in *any* investigation; "*the* investigation" (in the singular) is the *government's* investigation. 18 U.S.C. 3663A(b)(4) (emphasis added).

This conclusion follows directly from the statutory text: "the singular 'offense' referred to in § 3663A(b)(4) is of course the criminal offense of conviction," and thus "[t]he singular 'investigation or prosecution' of 'the offense' is * * * the [*government's*] criminal investigation and prosecution." *Papagno*, 639 F.3d at 1097-1098; see also, *e.g.*, *United States* v. *Juvenile Female*, 296 F. App'x 547, 551 (9th Cir. 2008) (Berzon, J., dissenting) ("it seems plain to me that '*the* investigation' for which restitution is available under § 3663A(b)(4) is the government's official investigation, not an entirely separate one engaged in by the victim's relatives").

Moreover, the section textually couples "*the* investigation or *prosecution*"—the key article ("the") applies to both terms. This pairing confirms that the investigation is the government's investigation. Only the government can prosecute "the offense" (a criminal term), and the pairing shows that Congress viewed the two actions together. The only investigation naturally paired with a criminal prosecution is a *criminal* investigation—especially when designated as "*the* investigation or prosecution *of the offense*."

Finally, if Congress meant to sweep in any investigation, even private ones, it would have simply said that. It could have framed the statute as applying to "any investigation" (or even "an investigation"). It instead singled out a specific investigation in the singular, linked it with the government's prosecution, and did so against the backdrop of a statute focused on punishment for "a defendant convicted of an offense." 18 U.S.C. 3663A(a)(1).

It thus is not enough to identify expenses incurred during participation in an internal investigation; "it is participation in *the* investigation—the government's investigation—that is subject to restitution, not costs incurred when striking out on one's own." *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting).

2. The same analysis applies to "attendance at proceedings related to the offense." Congress plainly intended to cover related criminal, not civil, "proceedings." For one, just as the investigation and prosecution refer to the government's *criminal* enforcement, it makes sense to likewise read the final clause "by the company it keeps." *Yates* v. *United States*, 135 S. Ct. 1074, 1085 (2015) (describing the noscitur a sociis canon). The section focuses on compensating victims for the incidental costs of the government's investigation and prosecution of the criminal offense; reimbursement for attendance at the

government's proceedings (those related to *the offense*) is the only natural reading.

For another, any contrary reading would produce bizarre results. Even if this final clause somehow captured civil suits, it would only cover the incidental costs of "attend[ing]" those proceedings, *not the actual costs or expenses of litigation*. While it makes sense to cover the victim's costs of attendance at *criminal* proceedings—the victim, for example, may have to testify—the costs of attending a civil suit (with the victim presumably as plaintiff) bear no obvious relation to Section 3663A's aims. There is no rational theory why Congress would have singled out a narrow sliver of expenses associated with litigating freestanding tort suits (or bankruptcy cases), but left all the other associated expenses uncompensated.[6]

b. Second, the covered costs must be incurred during "participation" in the investigation or prosecution (18 U.S.C. 3663A(b)(4)), which necessarily means taking part in the government's work. An unsolicited internal investigation, conducted entirely outside the government's investigation, may eventually *assist* the government's efforts, but it does not qualify as "*participation*" in those efforts.

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[6] Moreover, even had Congress intended to cover *some* "expenses" in civil proceedings, it did not cover attorney's fees. There is a strong presumption under the American Rule that "parties are to bear their own attorney's fees." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994). To reverse that presumption, Congress must legislate with "explicit statutory authority." *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (internal quotation marks omitted). Because Section 3663A(b)(4) has no "'specific and explicit provisions for the allowance of attorneys' fees'" (*ibid.*), it necessarily leaves the default presumption in place. And the omission in Section 3663A(b)(4) is notable: Congress expressly authorized "attorneys' fees" in other restitution provisions (*e.g.*, 18 U.S.C. 2259(b)(3)(E)), but conspicuously omitted such a provision in Section 3663A(b)(4).

"The dictionary definition of 'participation' is the 'act of taking part or sharing in something.'" *Papagno*, 639 F.3d at 1098 (quoting sources). In common parlance, that does not mean simply "assisting" another's work. An inventor who improves a polygraph machine may *assist* future FBI investigations, but no one colloquially says the inventor *participated* in those investigations. See *ibid.* (offering similar examples). And this Court has reached the same conclusion in other contexts, "reject[ing] the proposition that 'aid' equals 'participation.'" *Ibid.*; see also, *e.g.*, *Pa. Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 211 (1998).

Participation, in short, means working with the government as it performs *its* work, not conducting a separate investigation on one's own—which is precisely what a corporation does by acting independently from the government. "The possibility that the [corporation's] internal investigation might later assist the criminal investigation or prosecution—for example, in plea negotiations—does not mean those who conducted the internal investigation were somehow taking part in the separate, criminal investigation or prosecution conducted by the criminal investigators and prosecutors." *Papagno*, 639 F.3d at 1099.

This common-sense distinction is reinforced by the enumerated terms in Section 3663A(b)(4). Each term ("lost income," "child care," "transportation") is designed to enable the party to *participate* in the government's work: it does not focus on private expenses one might incur in *running* a private investigation (things like professional fees for lawyers or auditors); it instead focuses exclusively on *incidental* costs designed to compensate a person for making themselves available *to the government*. Each expense—like "child care" and "transportation"—is necessary so the person can do things like meet with federal agents and testify at criminal proceedings.

Child care and transportation are not themselves needed to conduct an investigation; they are needed to *facilitate* interaction with the *government's* investigation. The contemplated role is providing evidence and testimony so the government can complete *its job*, not so it can outsource its investigatory duties to private actors.

A private, parallel investigation may thus *assist* the government, but it is not *participating* in "the investigation." And that is especially so where the investigation was "neither required nor requested" by the government (*Papagno*, 639 F.3d at 1099): at least where the government has put in the request, the private actor is *coordinating* with the official investigation. But an investigation conducted entirely separately (indeed, without the knowledge of the government) is not commonly described as "participating" in that other investigation.[7]

c. Section 3663A(b)(4) explicitly requires that covered expenses be incurred "*during*" participation in the investigation or prosecution. That language means exactly what it says. "During" does not mean *before*. A private investigation that *precedes* the government's investigation does not generate expenses *during* the government's investigation; "[a]fter all, one cannot ordinarily be participating in something that has not yet begun." *Papagno*, 639 F.3d at 1099.[8]

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[7] This line also respects the government's critical role in criminal enforcement. The government is not expected to outsource its sovereign functions to private actors. The MVRA does not contemplate restitution for *the government's* expense in investigating an offense; surely it makes little sense to shift those costs to the defendant whenever the government can convince a private citizen to take on the government's core responsibilities.

[8] To be clear, even if the government's investigation is underway, a covered expense must still be incurred "during *participation*" in the

Nor was this language accidental, as underscored by a "critical" difference between the MVRA's Section 3663A(b)(4) and the VWPA's Section 3663(b)(4). *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting). While Section 3663A(b)(4) is limited to expenses "*during* participation in the investigation," Section 3663(b)(4) covers "expenses *related to* participation in the investigation." *Ibid.* (emphases in original). As Judge Berzon explained, "[t]he difference is both obvious and significant": "Whether or not [the victim's] investigative activities were 'related to' participation in the government's investigation, they did not occur 'during participation' in it." *Ibid.*[9]

"[W]hen Congress includes particular language in one section of a statute but omits it in another," "this Court presumes that Congress intended a difference in meaning." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (internal quotation marks and alternation omitted). The difference in meaning here is clear: if an expense is incurred before the government's investigation begins, it is not incurred "during" that (non-existent) investigation. Such expenses are not covered under the MVRA.[10]

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investigation. This is one reason (among others) that a parallel investigation is not automatically covered: even if the expenses were incurred at the same time as the government's work, they are excluded unless they were incurred while *participating* in the government's work. Each statutory condition must be met.

[9] Even the Second Circuit, a court aligned with the court of appeals below, admitted the difficulty of saying expenses incurred *before* the government's investigation were somehow incurred "during" that investigation. See *United States* v. *Cuti*, 778 F.3d 83, 96 n.5 (2d Cir. 2014).

[10] There are sound reasons Congress might have written the statute the way that it did. For example, it avoids difficult questions re-

d. Section 3663A(b)(4) authorizes restitution only for "necessary" expenses, and an expense cannot be "necessary" for participation in the investigation if nobody requested it. "It is difficult—indeed, impossible—to argue that an internal investigation neither required nor requested by criminal investigators was an expense *necessary*" for "participation in the investigation or prosecution." *Papagno*, 639 F.3d at 1100.

An expense is not "necessary" if the government is already obligated to do the work and no one asked the victim to do it. That describes most internal investigations: the government is particularly well-suited to conduct its own investigation, and the private actor need not incur the expenses to replicate the government's work on its own. Indeed, "[i]t is not particularly common for criminal investigators to ask an organization to conduct an internal investigation. Criminal investigators tend to think such activity can compromise the criminal investigation or subsequent prosecution—for example, by multiplying witness statements." *Papagno*, 639 F.3d at 1100 n.5.

Moreover, treating unsolicited internal investigations as "necessary" imposes "challenging restitution calculations" on district judges. Pet. App. 9a-10a (Higginson, J., concurring); *id.* at 8a ("I do not envy district courts faced with this task."). An internal investigation typically asks "what went wrong, whom to hold accountable, and how to prevent recurrence of the problem." *Papagno*, 639 F.3d at 1099 n.2. The scope of the investigation thus will often exceed the simple identification of wrongdoing for criminal

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garding whether private work was really necessary to the investigation, or simply used (to whatever effect) because it already exists. It also avoids restitution for tasks the government would have performed on its own. These checks avoid administrability concerns and ensure fairness to all sides. See, *e.g.*, Pet. App. 7a-11a (Higginson, J., concurring).

prosecution, and it will be difficult to disaggregate necessary expenses from unnecessary ones (including, of course, the costs incurred to investigate the crime versus the costs incurred to prevent its recurrence or seek civil redress).

And those challenges become even more pronounced where the internal investigation was neither required nor requested by the government. In those situations, there is a greater likelihood of redundant and overlapping work (due to the lack of coordination), and it is also more difficult to determine what evidence the government really wanted or needed (if the government receives a report sweeping past its core focus). See, *e.g.*, Pet. App. 7a-10a (Higginson, J., concurring) (outlining thorny hypotheticals caused by the Fifth Circuit's view).

Part of the MVRA's logic is avoiding complex factual disputes. See 18 U.S.C. 3663A(c)(3)(B) (excusing restitution where "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process").[11] Enforcing the statutory standard helps avoid these difficult questions, and ensures expenses truly are "necessary" before saddling a defendant with significant liability in a criminal judgment. And it is hard to say expenses are "necessary" where a company, unprompted, decides to undertake the government's investigative role on its own.

e. In any event, there is a more fundamental reason that Section 3663A(b)(4) bars reimbursement for internal

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[11] Cf. S. Rep. 104-179, 104th Cong., 1st Sess. 18 (1995) (looking to "guarantee[] that the sentencing phase of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings").

investigations and professional fees: Under a straightforward application of ejusdem generis, professional fees from internal investigations and civil litigation do not qualify as "other expenses."

The statute sets out a specific list of covered costs: "*lost income* and necessary *child care*, *transportation*, and *other expenses* incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4) (emphases added). "'[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects *similar in nature* to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001); see also, *e.g.*, *CSX Trans., Inc.* v. *Ala. Dep't of Revenue*, 562 U.S. 277, 294-295 (2011).

Thus, when Congress wrote "other expenses" in the MVRA, it necessarily wrote other *like* expenses; the residual clause encompasses only "subjects comparable to the specifics it follows." *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008). An extensive, self-initiated internal investigation, employing attorneys, auditors, and forensic accountants, is in no way "comparable" to minor incidental expenses associated with missing work or traveling to meet with federal agents or testify at trial. For example, no one thinks each of the following statements go together: "Pay for my babysitter, pay for my parking, and pay for my half-year, multimillion-dollar internal investigation." One category is nothing like the others, and this language is not how Congress would have included something as different and significant as those professional expenses.

Moreover, the enumerated categories share an obvious connection that professional fees do not: "transportation" and "child care" costs are incidental, out-of-pocket

expenses, representing the day-to-day costs associated with making oneself available to the government for *its* investigatory and prosecutorial work. None are expenses from *direct* participation in an investigation.

Investigation expenses and professional fees often comprise significant sums that affect defendants and victims in material ways. Here, for example, the restitution order included nearly $5 million of private fees and expenses, and other cases involve similarly substantial amounts. See, *e.g.*, *Papagno*, 639 F.3d at 1095 ($160,000 in expenses); *United States* v. *Bahel*, 662 F.3d 610, 648 (2d Cir. 2011) (nearly $850,000 in legal fees); *United States* v. *Hosking*, 567 F.3d 329, 331 (7th Cir. 2009) ($125,000 in investigation expenses); *United States* v. *Skowron*, 529 F. App'x 71, 73 (2d Cir. 2013) ($3.827 million in expenses). These totals are hardly in the same universe as taxi fare, parking fees, or child-care costs.

Congress knows how to write a statute to include those costs when it so wishes—and Congress is well aware of the background principles of ejusdem generis. The catchall phrase here—"other expenses"—is not nearly so capacious as to cover professional fees incurred for the victim's own purposes and unprompted by any official government action.

**2. Section 3663A(b)(4)'s statutory context and history confirm that restitution is unauthorized for these expenses**

Section 3663A(b)(4)'s statutory context and history further establish that the MVRA does not authorize restitution for these expenses.

a. First, at the same time that Congress added Section 3663(b)(4) to the VWPA—which was the foundation for Section 3663A(b)(4) of the MVRA—Congress added a series of *other* provisions that broadly capture expenses that are not covered here. Indeed, in a series of enactments,

Congress set out rights for particular crime victims that expressly included (i) awards of attorney's fees, and (ii) sweeping restitution for any costs "proximately caused" by the subject offense. See, *e.g.*, 18 U.S.C. 2259(b)(3)(E), (F) (authorizing "attorneys' fees" and "any other losses suffered by the victim as a proximate result of the offense"; added as § 40113(b)(1) of the 1994 Act); 18 U.S.C. 2248(b)(3)(E), (F) (same; added as § 40113(a)(1) of the 1994 Act). Moreover, these provisions expressly apply "[n]othwithstanding section 3663 or 3663A" (18 U.S.C. 2259(a)), showing that Congress was indeed aware of the stark differences between these restitution provisions.

Second, Congress amended the VWPA again in 2008 to authorize restitution for "internal investigations" by "identity theft" victims, "even if the internal investigation was neither required nor requested by the criminal investigators or prosecutors." *Papagno*, 639 F.3d at 1099 (describing 18 U.S.C. 3663(b)(6)). Congress thus added Section 3663(b)(6) precisely because Section 3663's *preexisting* sections—including Section 3663(b)(4)—did not provide that broad relief. *Id.* at 1099-1100. But Congress chose to limit that new coverage to identify-theft victims, and Congress opted not to "add similar language" to broaden Section 3663A(b)(4). *Id.* at 1099.

As this Court has "often" stated, "when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Papagno*, 639 F.3d at 1099-1100 & n.3 (quoting *Kucana* v. *Holder*, 558 U.S. 233, 248-249 (2010)). Section 3663A enumerates four specific categories of recovery as the only expenses eligible for restitution, none of which embrace the kinds of costs authorized in those other Acts. If Congress truly in-

tended to extensively cover all professional costs and internal-investigation expenses, it knew precisely how to do it.

b. Section 3663A's historical backdrop also supports faithfully applying the statute's narrow scope. Until 1982, restitution was not permitted outside the probation context. *Papagno*, 639 F.3d at 1096. Courts lacked the power to impose restitution absent specific statutory authorization. See *ibid.* These new restitution provisions thus changed the default rules that had otherwise applied for extensive periods of time.

A sweeping construction of the MVRA would represent a sharp departure from baseline norms. It may indeed be permissible to abandon traditional limits on restitution (reaching not just disgorgement but consequential damages),[12] but courts are reluctant to presume a derogation of the common law absent specific language to that effect. See, *e.g.*, *United States* v. *Texas*, 507 U.S. 529, 534 (1993). There is no such specific language here—even though there *is* such specific language in other restitution provisions.

The internal-investigation costs at issue are traditionally the subject of civil tort suits, where courts can provide make-whole recovery without intruding upon the criminal-justice system's need for swift and efficient sentencing. Section 3663A lacks the kind of clear language typi-

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[12] See, *e.g.*, Bradford Mank, *The Scope of Criminal Restitution: Awarding Unliquidated Damages in Sentencing Hearings*, 17 Capital Univ. L. Rev. 55, 69 (1987) (citing, *inter alia*, 4 W. Blackstone, *Commentaries on the Laws of England* 356 (1769)); see also Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and An Analysis of Its Present Usefulness*, 5 U. Rich. L. Rev. 71, 75-81 (1970) (explaining the origins of highly restricted common law restitution).

cally required to abandon this traditional division of authority. *Texas*, 507 U.S. at 534-536; see also *United States* v. *Nucci*, 364 F.3d 419, 423-424 (2d Cir. 2004) (applying this principle to the MVRA itself); *United States* v. *Tilleras*, 709 F.2d 1088, 1092 (6th Cir. 1983) ("Even when such an intention [to abrogate common law by statute] is explicit, the scope of the common law will be altered no further than is necessary to give effect to the language of the statute.").

### B. The Contrary Interpretation—Embraced By The Government And Multiple Courts Of Appeals—Is Unsupportable

Notwithstanding Section 3663A's plain text, context, and history, the government and several courts of appeals resist assigning the statute its natural scope. For multiple reasons, their interpretation is incorrect and should be rejected.

1. The government argues that *Papagno*'s "restrictive understanding of Section 3663A(b)(4) loses sight" of the MVRA's "'purpose,'" which is "'to ensure that victims of a crime receive full restitution.'" Br. in Opp. 11 (quoting *Dolan* v. *United States*, 560 U.S. 605, 612 (2010)). But "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam).

Congress's purpose is ultimately reflected in its actual text. And if Congress truly meant to "ensure" that crime victims receive "full restitution," it would have written a simple, general statute that says exactly that—as opposed to a carefully delineated statute that limits restitution to specific, enumerated categories. Compare, *e.g.*, 18 U.S.C. 2259(b)(3)(F).

Moreover, the government overlooks that victims can still recover in full even if restitution is properly cabined to its statutory limits: "where criminal restitution statutes fall short, victims may bring their own civil actions to recover." Pet. App. 10a-11a (Higginson, J., concurring).

2. Because the statute reimburses for participating in an investigation, certain courts have presumed that *any* investigation qualifies. See, *e.g.*, *United States* v. *Amato*, 540 F.3d 153, 162 (2d Cir. 2008) (authorizing restitution for *both* a corporation's "own internal investigation" *and* "its participation in the government's investigation and prosecution"). As explained above, however, that assumption is refuted by the statute's plain text. See *Papagno*, 639 F.3d at 1097-1098 ("[t]he singular 'investigation or prosecution' of 'the offense' is therefore the criminal investigation and prosecution" conducted by the government); *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting) ("it is participation in *the* investigation—the government's investigation—that is subject to restitution, not costs incurred when striking out on one's own"). The courts have failed to grapple with this obvious counterargument.

For its part, the government, invoking the Dictionary Act, argues that "the investigation" referenced in Section 3663A(b)(4) is not necessarily limited to a *single* investigation, because "words importing the singular include and apply to several persons, parties, or things." Br. in Opp. 10 (quoting 1 U.S.C. 1). But Congress confirmed that the Act's default drafting rules do not apply where "the context indicates otherwise" (1 U.S.C. 1), as it assuredly does here. The government has not explained how its reading of the statute makes any sense in its natural context.

3. According to the Fifth Circuit, the MVRA authorizes any expenses directly or proximately caused by the crime—irrespective of any attempt to fit the expense in

one of Section 3663(b)'s enumerated categories. Pet. App. 2a-5a (authorizing fees "directly caused" by defendant's "wire fraud scheme"); *United States* v. *Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009) (asking only whether expenses "were directly caused by a defendant's fraudulent conduct"); C.A. Gov't Br. 10 ("This Court's precedent as well as a majority of Circuit precedent interpret 18 U.S.C. § 3663A as expressly authorizing such expenses for restitution, where, as here, the expenses are shown to be directly caused by the defendant's fraud.").

This ignores the MVRA's clear structure. These cases are borrowing the standard from Section 3663A(a)(2), which defines *which "victims" are eligible* for restitution; once a qualified candidate is identified, courts must still look to Section 3663A(b), which defines the scope of *eligible expenses*. Congress did not carefully delineate the scope of restitution to simply revert back to any expenses somehow "caused" by the offense. See, *e.g.*, *Papagno*, 639 F.3d at 1100 ("this particular restitution provision—unlike some others—does not afford a right to reimbursement for all costs caused in some sense by the defendant").

### C. Under The Rule of Lenity, Any Statutory Ambiguity Should Be Construed Against Sweeping And Unconventional Restitution Orders

As explained above, it is clear that Section 3663A forecloses restitution for these expenses. But to the extent any ambiguity exists, it must be construed against increased punishment. *Hughey* v. *United States*, 495 U.S. 411, 422 (1990); see also, *e.g.*, *Jones* v. *United States*, 529 U.S. 848, 858 (2000); *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality op.) (Scalia, J.) ("Under a long line of our decisions, the tie must go to the defendant."). The Court has applied the rule of lenity in the context of criminal restitution. *Hughey*, 495 U.S. at 412-413. It ensures

that Congress, not the judiciary, sets the outer punishment for an offense.

If Congress wanted to expand restitution to cover unprompted, private, voluntary costs of conducting extensive internal investigations and civil litigation, it would have said so expressly. What it did say points in the opposite direction, and any contrary indications are insufficient to tip the scales toward increased punishment.

## II. THE COURT OF APPEALS ERRED IN APPLYING THE MVRA TO THE UNDISPUTED FACTS OF THIS CASE

The court of appeals' erroneous construction of Section 3663A(b)(4) was outcome-determinative below. Under a proper construction, the government's claim for restitution fails on every level.

*First*, the government's claim to recover the costs of the internal investigation is meritless: (i) the expenses were not incurred as part of the government's investigation; (ii) GECC failed to participate in that investigation (merely assisting is not enough); (iii) GECC did not incur any expenses *during* the government's investigation (because GECC's investigation *preceded* it); (iv) its expenses were not required or requested by the government, and hence were not "necessary" to the government's enforcement; and (v) its professional fees are not properly covered at all. Each failing independently infects the judgment below.

*Second*, the government's claim to recover the costs of the bankruptcy litigation is also meritless: (i) none of those fees were required or requested by the government; (ii) none had anything to do with the government's investigation or prosecution (or, indeed, *any* investigation); (iii) none were directly caused by the offense (they were directly caused by the *bankruptcy*); (iv) none resemble "child care" or "transportation" (or otherwise qualify as

"other expenses"); and (v) none are expressly included in Section 3663A(b)(4), even if the Fifth Circuit felt GECC qualified as a "victim" under Section 3663A(b)(2).

Because these expenses fall outside the permissible scope of Section 3663A(b)(4), the judgment ordering the corresponding restitution was incorrect, and it should be reversed.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

1. 18 U.S.C. 3663A provides:

**§ 3663A. Mandatory restitution to victims of certain crimes**

**(a)(1)** Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

**(2)** For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

**(3)** The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

**(b)** The order of restitution shall require that such defendant--

**(1)** in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

**(A)** return the property to the owner of the property or someone designated by the owner; or

**(B)** if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

**(i)** the greater of--

**(I)** the value of the property on the date of the damage, loss, or destruction; or

**(II)** the value of the property on the date of sentencing, less

**(ii)** the value (as of the date the property is returned) of any part of the property that is returned;

**(2)** in the case of an offense resulting in bodily injury to a victim--

**(A)** pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psycho-

logical care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense–

(A) that is–

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances

Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

**(iii)** an offense described in section 1365 (relating to tampering with consumer products); or

**(iv)** an offense under section 670 (relating to theft of medical products); and

**(B)** in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--

**(A)** the number of identifiable victims is so large as to make restitution impracticable; or

**(B)** determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

**(d)** An order of restitution under this section shall be issued and enforced in accordance with section 3664.

2. 18 U.S.C. 3663 provides:

**§ 3663. Order of restitution**

**(a)(1)(A)** The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

**(B)(i)** The court, in determining whether to order restitution under this section, shall consider--

**(I)** the amount of the loss sustained by each victim as a result of the offense; and

**(II)** the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

**(ii)** To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the

need to provide restitution to any victims, the court may decline to make such an order.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant–

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of--

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110–

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense;

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate; and

(6) in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

(2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by

the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

(B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.

(3) Restitution under this subsection shall be distributed as follows:

(A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

(B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

(4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

(5) Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

(7)(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

3. 18 U.S.C. 2259 provides:

**§ 2259. Mandatory restitution**

(a) **In general.**—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) **Scope and nature of order.**—

(1) **Directions.**—The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) **Enforcement.**—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) **Definition.**—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) **Order mandatory.**—(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of--

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) **Definition.**—For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

No. 16-1519

# In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES


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## QUESTION PRESENTED

Whether the district court erred in ordering restitution under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, for a crime victim's investigatory and legal expenses that were caused by the defendant's offense but were not requested by the government.

## TABLE OF CONTENTS


Page

Opinion below ..... 1
Jurisdiction ..... 1
Statutory provisions involved ..... 1
Statement ..... 1
Summary of argument ..... 12
Argument:
The MVRA required petitioner to pay restitution for GE Capital's investigatory and legal expenses caused by his fraud ..... 15
A. GE Capital's investigatory and legal expenses entitled it to restitution as a "victim" of petitioner's fraud ..... 16
B. GE Capital's investigatory and legal expenses are recoverable in restitution under 18 U.S.C. 3663A(b)(4) ..... 23
1. GE Capital incurred recoverable expenses when it participated in the investigation of petitioner's fraud ..... 23
2. GE Capital incurred recoverable expenses when it attended Dry Van's bankruptcy proceedings ..... 36
3. The MVRA does not categorically deny restitution for attorney's fees and other professional fees ..... 40
4. The rule of lenity does not support petitioner's requested limitations on restitution ..... 45
C. The district court's restitution order is independently supported by 18 U.S.C. 3663A(b)(1) ..... 46
Conclusion ..... 49
Appendix — Statutory provisions ..... 1a

## TABLE OF AUTHORITIES

Cases: Page

*Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008) ..... 41, 42
*Ayestas* v. *Davis*, No. 16-6795, 2018 WL 1402425 (Mar. 21, 2018) ..... 34
*Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158 (2015) ..... 44
*Commissioner* v. *Tellier*, 383 U.S. 687 (1966) ..... 34
*Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973 (2017) ..... 22, 36
*Dolan* v. *United States*, 560 U.S. 605 (2010) ..... *passim*
*Hughey* v. *United States*, 495 U.S. 411 (1990) ..... 18, 45
*Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018) ..... 32
*Kelly* v. *Robinson*, 479 U.S. 36 (1986) ..... 22
*Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519 (2013) ..... 32
*Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) ..... 19
*Muscarello* v. *United States*, 524 U.S. 125 (1998) ..... 45
*Paroline* v. *United States*, 134 S. Ct. 1710 (2014) ..... 19, 21, 43, 44
*Reves* v. *Ernst & Young*, 507 U.S. 170 (1993) ..... 30
*Robers* v. *United States*, 134 S. Ct. 1854 (2014) ..... 19, 22, 45, 47, 48
*Russello* v. *United States*, 464 U.S. 16 (1983) ..... 30
*Schweiker* v. *Hogan*, 457 U.S. 569 (1982) ..... 47
*Thigpen* v. *Roberts*, 468 U.S. 27 (1984) ..... 46
*United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988) ..... 22
*United States* v. *Abdelbary*, 746 F.3d 570 (4th Cir. 2014) ..... 46

Cases—Continued: Page

*United States* v. *Adcock*, 534 F.3d 635 (7th Cir. 2008) ..... 28
*United States* v. *Amato*, 540 F.3d 153 (2d Cir. 2008), cert. denied, 556 U.S. 1138 (2009) ..... 24, 28, 41, 42
*United States* v. *Bahel*, 662 F.3d 610 (2d Cir. 2011) ..... 28
*United States* v. *Corey*, 77 Fed. Appx. 7 (1st Cir. 2003) ..... 20, 46
*United States* v. *Cummings*, 281 F.3d 1046 (9th Cir. 2002) ..... 39
*United States* v. *Cuti*, 778 F.3d 83 (2d Cir. 2015) ..... 28, 42
*United States* v. *DeRosier*, 501 F.3d 888 (8th Cir. 2007) ..... 28
*United States* v. *Dwyer*, 275 Fed. Appx. 269, (5th Cir.), cert. denied, 553 U.S. 1043 (2008) ..... 28
*United States* v. *Ekanem*, 383 F.3d 40 (2d Cir. 2004) ..... 32
*United States* v. *Elson*, 577 F.3d 713 (6th Cir. 2009) ..... 23
*United States* v. *Eyraud*, 809 F.3d 462 (9th Cir. 2015) ..... 20, 33, 40
*United States* v. *Herrera*, 606 Fed. Appx. 748 (5th Cir. 2015) ..... 27
*United States* v. *Hosking*, 567 F.3d 329 (7th Cir. 2009) ..... 20, 24, 27, 32, 40, 46
*United States* v. *Janosko*, 642 F.3d 40 (1st Cir. 2011) ..... 23
*United States* v. *Juvenile Female*, 296 Fed. Appx. 547 (9th Cir. 2008) ..... 32, 40, 41
*United States* v. *Martin*, 128 F.3d 1188 (7th Cir. 1997) ..... 32
*United States* v. *Maynard*, 743 F.3d 374 (2d Cir. 2014) ..... 33, 34
*United States* v. *Nosal*, 844 F.3d 1024 (9th Cir. 2016), cert. denied, 138 S. Ct. 314 (2017) ..... 23, 34

Cases—Continued: Page

*United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011) ..... 11, 12, 26, 30
*United States* v. *Phillips*, 477 F.3d 215 (5th Cir.), cert. denied, 552 U.S. 820 (2007) ..... 24
*United States* v. *Qurashi*:
No. 05-CR-498, 2009 WL 10677000 (E.D.N.Y. Sept. 1, 2009) ..... 28
634 F.3d 699 (2d Cir. 2011) ..... 27
*United States* v. *Scott*, 405 F.3d 615 (7th Cir. 2005) ..... 46
*United States* v. *Sharma*, 703 F.3d 318 (5th Cir. 2012), cert. denied, 134 S. Ct. 78 (2013) ..... 10
*United States* v. *Skowron*, 839 F. Supp. 2d 740 (S.D.N.Y. 2012) ..... 40
*United States* v. *Stennis-Williams*, 557 F.3d 927 (8th Cir. 2009) ..... 24

Statutes:

Identity Theft Enforcement and Restitution Act of 2008, Pub. L. No. 110-326, § 202, 122 Stat. 3561 (18 U.S.C. 3663(b)(6)) ..... 35
International Parental Kidnapping Crime Act of 1993, 18 U.S.C. 1204 ..... 39
Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A (§ 201 *et seq.*), 110 Stat. 1227 ..... 7
18 U.S.C. 3663A ..... 8, 39, 1a
18 U.S.C. 3663A(a) ..... 45, 1a
18 U.S.C. 3663A(a)(1) ..... 7, 12, 16, 17, 18, 1a
18 U.S.C. 3663A(a)(2) ..... *passim*, 1a
18 U.S.C. 3663A(b) ..... 13, 16, 18, 22, 23, 44, 2a
18 U.S.C. 3663A(b)(1) ..... *passim*, 2a
18 U.S.C. 3663A(b)(1)(B) ..... 49, 2a

Statutes—Continued: Page

18 U.S.C. 3663A(b)(1)(B)(i) ..... 49, 2a
18 U.S.C. 3663A(b)(4) ..... *passim*, 3a
18 U.S.C. 3663A(c)(1) ..... 7, 17, 18, 3a
18 U.S.C. 3663A(c)(1)(A) ..... 16, 3a
18 U.S.C. 3663A(c)(1)(B) ..... 16, 3a
18 U.S.C. 3663A(d) ..... 8, 4a
Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248:
§ 2(a)(1), 96 Stat. 1248 ..... 42
§ 5, 96 Stat. 1253-1255 ..... 16
18 U.S.C. 3663 ..... 17
18 U.S.C. 3663(a)(1)(A) ..... 16, 17
18 U.S.C. 3663(a)(1)(B)(i) ..... 17
18 U.S.C. 3663(a)(2) ..... 18
18 U.S.C. 3663(b) ..... 18
18 U.S.C. 3663(b)(1) ..... 17
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 40504, 108 Stat. 1947 (18 U.S.C. 3663(b)(4)) ..... 17, 31, 32, 39
1 U.S.C. 1 ..... 19, 26
11 U.S.C. 362(a) ..... 36
18 U.S.C. 2 ..... 2
18 U.S.C. 1028(a) ..... 35
18 U.S.C. 1028(d)(3) ..... 35
18 U.S.C. 1028(d)(4) ..... 35
18 U.S.C. 1028(d)(7) ..... 35
18 U.S.C. 1028A(a) ..... 35
18 U.S.C. 1343 ..... 2
18 U.S.C. 1349 ..... 1
18 U.S.C. 1962(c) ..... 30
18 U.S.C. 2248 ..... 43

Statutes—Continued: Page

18 U.S.C. 2259(b)(1) ..... 43
18 U.S.C. 2259(b)(3) ..... 43
18 U.S.C. 2259(b)(3)(C) ..... 43
18 U.S.C. 2264 ..... 43
18 U.S.C. 3664(a) ..... 8, 4a
18 U.S.C. 3664(d) ..... 8, 5a
18 U.S.C. 3664(d)(6) ..... 9, 31, 7a
18 U.S.C. 3664(e) ..... 9, 19, 31, 7a
18 U.S.C. 3664(f)(1)(A) ..... *passim*, 7a
18 U.S.C. 3664(h) ..... 7, 9a
18 U.S.C. 3771(a)(3) ..... 28, 33, 12a
18 U.S.C. 3771(a)(4) ..... 28, 38, 12a
26 U.S.C. 162(a) (1964) ..... 34

Miscellaneous:

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Hon. William H. Pryor Jr., *The Integral Role of Federal Probation Officers in the Guidelines System*, Federal Probation (Sept. 2017), http://www.uscourts.gov/ sites/default/files/ federalprobation-sept2017-508.pdf ..... 31
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S. Rep. No. 179, 104th Cong., 1st Sess. (1995) ..... 18

Miscellaneous—Continued: Page

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*Webster's Third New International Dictionary* (1993) ..... 19, 25, 26, 30

# In the Supreme Court of the United States

No. 16-1519

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 864 F.3d 320.

### JURISDICTION

The judgment of the court of appeals was entered on March 17, 2017. The petition for a writ of certiorari was filed on June 15, 2017, and was granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-18a.

### STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349, and five counts of

wire fraud, in violation of 18 U.S.C. 1343 and 2. Pet. App. 12a-15a. He was sentenced to 97 months of imprisonment, to be followed by three years of supervised release. *Id.* at 16a-18a. He was ordered to pay restitution in the amount of $15,970,517.37. *Id.* at 23a-24a. The court of appeals affirmed. *Id.* at 1a-11a.

1. Petitioner was the owner and CEO of a holding company that owned USA Dry Van Logistics LLC (Dry Van),[1] a trucking company that specialized in cross-border transportation services. J.A. 33-34. Over the course of nearly two years, petitioner fraudulently induced General Electric Capital Corporation (GE Capital), a public company's wholly owned subsidiary, to loan tens of millions of dollars to Dry Van by modifying Dry Van's records in difficult-to-detect ways that made the business appear substantially more valuable than it actually was. GE Capital ultimately incurred nearly $5 million in losses getting to the bottom of petitioner's fraud and attempting to recover as much from the ruined business as it could.

a. The subject of petitioner's fraud was GE Capital's revolving-loan finance agreement for Dry Van. J.A. 34. The loan was secured by Dry Van's accounts receivable, the balance of which Dry Van periodically reported on "Borrowing Base Certificates." J.A. 34-35. The amount of the line of credit was 85% of Dry Van's "eligible" accounts receivable, which were accounts that were less than 90 days old, up to a set limit. *Ibid.* In May 2003, Dry Van obtained an initial line of credit of between $2 million and $3 million, which eventually increased as high as $35 million at the height of the fraud. J.A. 36.

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[1] "Dry Van" refers collectively to USA Dry Van Logistics LLC, its holding company, and the holding company's other subsidiaries.

Around March 2008, petitioner met with his associate, Aurelio Aleman-Longoria, and Dry Van's controller, Oscar Cano Barbosa, and proposed a scheme to fraudulently mislead GE Capital by overstating the amount of Dry Van's accounts receivable in order to increase the amount that Dry Van was permitted to borrow. J.A. 36-37. The fraud involved both the creation and management of fictitious customer accounts and the fraudulent modification of older legitimate accounts to make them appear more recent. *Ibid.*

Petitioner and his confederates disconnected their accounting software from their transportation-dispatch system, which kept track of their legitimate sales, thereby enabling them to input false sales invoices into the accounting software. J.A. 38. In order to create the appearance that the fraudulent invoices were being paid by genuine customers, the conspirators used some of the funds that GE Capital itself was providing. J.A. 37. They transferred a portion of the GE Capital loan proceeds from Dry Van's operating account to the "Lockbox" account where Dry Van normally received customer payments, and then applied the GE Capital funding to the fictitious customer accounts. J.A. 37, 39-40. The conspirators also took older invoices from actual customers that were too stale to qualify for the borrowing base and altered them to make them appear to have been issued more recently. J.A. 37. The conspirators issued a "credit" for the amount due on the older sales invoices, then issued new sales invoices with the same value but a more recent date. J.A. 37 & n.4, 39-40.

As the scheme generated increasingly more loan proceeds, petitioner and Aleman-Longoria personally took millions of dollars out of Dry Van. J.A. 41. Petitioner used the money to fund an extravagant lifestyle.

J.A. 40; see C.A. ROA 471-473 (listing some of petitioner's lavish spending during the conspiracy on luxury vehicles, travel, retail, and entertainment). Because petitioner and Aleman-Longoria spent so much, Dry Van was required to continuously increase the amount of its fraudulent borrowing. J.A. 40. Petitioner would monitor Dry Van's operating account and, whenever a shortfall existed, would tell Barbosa the amount of additional false invoices to create to obtain additional funds from GE Capital. *Ibid.* The end result of petitioner's scheme was that, of the approximately $37.266 million in accounts receivable that Dry Van showed on its books, $26.725 million was fraudulent. J.A. 38.

b. Petitioner and his confederates took extensive measures to prevent GE Capital and its auditors from detecting the fraud. J.A. 39-41. Each time Dry Van was audited, Barbosa would delay the auditors so that he could provide the requested invoices the following day. J.A. 39. Barbosa and the accounting staff would then work late that night creating fake invoices to give to the auditors. *Ibid.* Accounting staff would also make the accounts appear even more genuine by pairing the fake invoices with legitimate proof-of-delivery documents with proximate dates. *Ibid.* And each time fraudulent invoices reached past-due status, Dry Van employees would post fake payments on them to the Lockbox account or would delete the fraudulent invoices from the system and create new fraudulent invoices for the same amount with a newer date. J.A. 39-40.

Petitioner and Aleman-Longoria also developed another ruse to prevent auditors from discovering the money they were taking out of Dry Van. J.A. 41. Toward the end of each calendar year of the fraud, petitioner and Aleman-Longoria would take money that

had been loaned to Dry Van from GE Capital and transfer it into certificates of deposit. *Ibid.* They would then obtain personal loans for themselves, using the money in the certificates of deposit as collateral. *Ibid.* They used the proceeds from the personal loans to pay back the distributions that they had taken from Dry Van during the past year. *Ibid.* The following year, they would use the money in the certificate-of-deposit accounts to pay off the personal loans in their names. *Ibid.*

c. The scheme collapsed in late 2009, when Dry Van could no longer make payments on its line of credit. J.A. 41. Dry Van hired a consultant to assist with its financial difficulties, and the consultant detected fraudulent activity. J.A. 42-43; C.A. ROA 298. On January 25, 2010, petitioner and Aleman-Longoria accompanied the consultant to inform GE Capital that they had been fraudulently overstating their accounts receivable, and Dry Van declared bankruptcy the following week. J.A. 43; C.A. ROA 298. Even after that, however, petitioner continued to withdraw proceeds of the fraud for his personal use. J.A. 43-44.

d. When GE Capital learned of petitioner's scheme, it acted immediately to investigate the fraud and mitigate its effects. "Given the magnitude and nature" of the fraud and the financial circumstances of Dry Van, J.A. 26, including that not all of Dry Van's accounts receivable were fictitious and that petitioner's scheme had plunged Dry Van into bankruptcy, GE Capital incurred significant additional losses responding to petitioner's offense.

First, GE Capital conducted an investigation that produced substantial information and analysis that was ultimately provided to the Federal Bureau of Investigation (FBI). See J.A. 18, 28-29. Shortly after discovering

the fraud, GE Capital ensured that key electronic documents and systems at Dry Van would not be lost or destroyed by petitioner or anyone else before the full scope and effects of the fraud could be uncovered. GE Capital hired Stroz Friedberg, a "computer forensics, investigations[,] and electronic discovery technical services firm," which took forensic images of hard drives at Dry Van; made backups of Dry Van's accounting system and transportation-dispatch system; and forensically copied the accounts receivable system, the billing system, and the Exchange database files, including emails. J.A. 28-29. GE Capital then hired Conway Del Genio, a financial consulting firm, to investigate the extent of the fraud by determining Dry Van's true financial condition. J.A. 29. Two law firms (Latham & Watkins and Winston & Strawn) also assisted in the investigation or provided legal advice related to the fraud. J.A. 27-28.

Second, the onset of bankruptcy proceedings for Dry Van required GE Capital to make further expenditures in order "to protect its rights and preserve its collateral." J.A. 27. GE Capital filed proofs of claim in those proceedings that sought to recover the value of its unpaid loans. J.A. 24. Later on, Dry Van's owners decided to liquidate the business, and GE Capital participated in that proceeding as well. *Ibid.* GE Capital was ordered by the bankruptcy court to "ma[ke] advance[s] to [Dry Van] during the bankruptcy case to enable [Dry Van] to continue operating." *Ibid.* Latham & Watkins provided counsel to GE Capital in connection with the proceedings, as did two other law firms (Foley & Mansfield and Jordan, Hyden, Womble, Culbreth & Holzer). J.A. 27-28. When the final bankruptcy proceeding was completed, GE Capital was still owed $11,074,047.64 from loans that Dry Van had not repaid. J.A. 68. GE

Capital's other expenses from the investigation and the bankruptcy proceedings totaled $4,895,469.73. J.A. 70.[2]

2. In 2013, a federal grand jury indicted petitioner (along with Aleman-Longoria and Barbosa) on one count of conspiracy to commit wire fraud and five counts of wire fraud. J.A. 32. Petitioner pleaded guilty to all counts without a plea agreement. J.A. 33. He was sentenced to 97 months of imprisonment, to be followed by three years of supervised release. Pet. App. 16a-18a. He was also ordered to pay restitution, jointly and severally with his co-defendants, in the amount of $15,970,517.37. *Id.* at 23a-24a; see 18 U.S.C. 3664(h).

a. The order of restitution in petitioner's case was based on the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A (§ 201 *et seq.*), 110 Stat. 1227. The MVRA governs restitution in most cases involving federal crimes with an identifiable victim. See 18 U.S.C. 3663A(c)(1). As particularly relevant here, it applies "in all sentencing proceedings for convictions of * * * an offense against property under [Title 18], * * * including any offense committed by fraud or deceit[,] * * * in which an identifiable victim or victims has suffered a * * * pecuniary loss." *Ibid.*

The MVRA requires that a sentencing court "shall order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1). The term

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[2] Separate from the bankruptcy proceedings, in March 2010, GE Capital filed a civil action against petitioner and Aleman-Longoria, which resulted in separate agreed judgments against each of them for over $33.555 million, plus interest. J.A. 44-45; see Agreed Judgment at 1, *General Elec. Capital Corp.* v. *Aleman*, No. 10-cv-77 (S.D. Tex. Aug. 16, 2010). As of petitioner's sentencing proceeding, however, GE Capital had received only $580,000 from petitioner. J.A. 45.

"victim" is defined as "a person directly and proximately harmed as a result of the commission of" an offense covered by Section 3663A, "including, in the case of an offense that involves as an element a scheme [or] conspiracy, * * * any person directly harmed by the defendant's criminal conduct in the course of the scheme." 18 U.S.C. 3663A(a)(2).

The MVRA provides that "in the case of an offense resulting in damage to or loss or destruction of property," the order of restitution "shall require" that the defendant "return the property" to its owner or, if such return is "impossible, impracticable, or inadequate, pay an amount equal to" the "value of the property" less "the value * * * of any part of the property that is returned." 18 U.S.C. 3663A(b)(1). The MVRA additionally provides that, "in any case," the order of restitution shall require the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4).

The sentencing court must "order restitution to each victim in the full amount of each victim's losses," and restitution must be determined "without consideration of the economic circumstances of the defendant." 18 U.S.C. 3664(f)(1)(A); 18 U.S.C. 3663A(d) (a restitution order under Section 3663A "shall be issued and enforced in accordance with section 3664").

To aid sentencing courts, the Probation Office conducts research and includes factual details relevant to restitution in a defendant's presentence investigation report. 18 U.S.C. 3664(a) and (d). When disputes arise between the parties regarding restitution, the district

court may refer any issue to a magistrate judge or special master, subject to a de novo determination by the district court. 18 U.S.C. 3664(d)(6). The statute places the burden of proof on the government, by "the preponderance of the evidence," to "demonstrat[e] the amount of the loss sustained by a victim as a result of the offense." 18 U.S.C. 3664(e).

b. In this case, the Probation Office ultimately recommended, in agreement with the government and based on two victim impact statements from GE Capital, that the district court order restitution in the amount of $15.971 million. J.A. 70; see J.A. 23-25, 26-29. That amount included $11.074 million in restitution for GE Capital's unrecovered loan principal, which petitioner has never contested. See Pet. Br. 11 n.5. The amount also included restitution for the $4.895 million in additional losses that GE Capital incurred in the investigation of petitioner's fraud and in the bankruptcy proceedings that followed the collapse of his scheme. J.A. 70. Petitioner objected to that portion of the restitution order, arguing that his own admission of wrongdoing to GE Capital had obviated the need for any investigation and that "recovery losses," including attorney's fees, are not eligible for restitution. J.A. 76.

The government responded by informing the district court that GE Capital's efforts had been critical to the investigation of petitioner's offense, and were "ultimately vital to the later prosecution of [him]." J.A. 18. The government observed that, even after petitioner's outside consultant had discovered his fraud and accompanied him to GE Capital, petitioner had not fully revealed the fraud. See C.A. ROA 298. The government noted that GE Capital had thus needed to spend "an

inordinate amount of resources" on experts, consultants, and lawyers to "investigat[e] the extent of the defendants' fraud to determine the amount of actual loss." J.A. 18. The government also stated that because Dry Van's bankruptcy proceedings were a "direct and proximate" result of petitioner's fraudulent scheme, GE Capital's expenses in those proceedings were eligible for restitution as well. J.A. 16-17. The government offered to introduce witnesses at the sentencing hearing, including officials from GE Capital, to further substantiate restitution. J.A. 79-81.

The district court found additional evidence unnecessary to resolve the contested issues, see C.A. ROA 255-257, and it agreed with the Probation Office and the government that restitution should include "damages incurred in overturning and discovering the loss," Pet. App. 39a. The court accordingly ordered $15,970,517.37 in restitution. *Id.* at 26a.

3. The court of appeals affirmed. Pet. App. 1a-11a. Applying de novo review, the court rejected petitioner's contention that the MVRA categorically disallows restitution for "forensic expert fees, legal fees, and consulting fees." *Id.* at 2a; see *id.* at 2a-5a.

The court of appeals observed that the MVRA "instructs a sentencing court to order restitution for a victim's 'actual loss directly and proximately caused by the defendant's offense of conviction.'" Pet. App. 2a (quoting *United States* v. *Sharma*, 703 F.3d 318, 323 (5th Cir. 2012), cert. denied, 134 S. Ct. 78 (2013)). The court further observed that under 18 U.S.C. 3663A(b)(4), mandatory restitution "includes 'lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution

of the offense or attendance at proceedings related to the offense.'" Pet. App. 2a.

The court of appeals determined that restitution was proper under Section 3663A(b)(4). Pet. App. 4a. It found that petitioner's "wire fraud scheme caused [GE Capital] to employ forensic experts to secure and preserve electronic data as well as lawyers and consultants to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud." *Ibid.* It accordingly reasoned that those expenses were "incurred by [GE Capital] during the investigation of the fraud" and "were necessary and compensable in the restitution award." *Ibid.* The court similarly reasoned that Section 3663A(b)(4) supported restitution for GE Capital's "legal fees incurred in the related bankruptcy proceedings." *Ibid.* The court determined that those fees "were directly caused by the defendants' fraud for purposes of restitution," because petitioner's "fraudulent scheme directly caused" Dry Van "to file for bankruptcy" and "[t]he bankruptcy court ordered [GE Capital] to continue to make advances to [Dry Van] during the bankruptcy proceedings." *Ibid.* The court noted that its determination accorded with its own precedent as well as the decisions of each of the other circuits to have addressed the issue, with the exception of the D.C. Circuit's decision in *United States* v. *Papagno*, 639 F.3d 1093 (2011). Pet. App. 4a-5a & n.2.

Judge Higginson concurred. Pet. App. 6a-11a. Although he acknowledged that the court of appeals' decision followed circuit precedent, he took the view that "'participating' in a government investigation does not embrace an internal investigation, 'at least one that

has not been required or requested by criminal investigators or prosecutors.'" *Id.* at 6a-7a (quoting *Papagno*, 639 F.3d at 1098-1099).

## SUMMARY OF ARGUMENT

The district court correctly awarded restitution for the investigatory and legal expenses that GE Capital incurred as a result of petitioner's fraud. Those expenses in themselves made GE Capital the "victim" of petitioner's fraud for purposes of the MVRA, requiring a mandatory order of restitution. 18 U.S.C. 3663A(a)(1) and (2). That order must include restitution for "necessary * * * expenses incurred during participation in the investigation * * * of the offense," such as the costs of unraveling petitioner's fraud, as well as restitution for "expenses incurred during * * * attendance at proceedings related to the offense," such as the costs incurred in the bankruptcy proceedings that the fraud precipitated. 18 U.S.C. 3663A(b)(4). The expenses were alternatively recoverable in restitution because the additional money that GE Capital was forced to spend was "property" lost as a "result[ ]" of the offense. 18 U.S.C. 3663A(b)(1). Petitioner's contrary interpretation of the MVRA would impose limitations on the statute that its text does not contain and that would contravene its "substantive purpose * * * to ensure that victims of a crime receive full restitution." *Dolan* v. *United States*, 560 U.S. 605, 612 (2010).

A. GE Capital's investigatory and legal expenses were "direct[ ] and proximate[ ] harm[s]" that resulted from petitioner's fraud, and they are part of what makes GE Capital a "victim" of petitioner's offense entitled to mandatory restitution under the MVRA. 18 U.S.C. 3663A(a)(1) and (2). GE Capital's efforts to get to the bottom of petitioner's fraud, and to recover as much as

it could in the bankruptcy proceedings that the fraud caused, were an expected, necessary, and societally desirable response to the crime. The ordinary definition of criminal "restitution" is the restoration of the victim to the position that it occupied before the offense. The restitution order in this case accords with that principle, and with multiple other provisions of the MVRA that reinforce that a sentencing court should broadly construe the categories of losses for which a victim may obtain restitution in 18 U.S.C. 3663A(b) in order to ensure that the victim receives full restitution.

B. GE Capital's investigatory and legal expenses are recoverable in restitution under 18 U.S.C. 3663A(b)(4), which requires restitution for "necessary * * * expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense."

GE Capital participated in the investigation of petitioner's offense by hiring forensic experts, consultants, and attorneys who preserved crucial evidence and unraveled petitioner's fraudulent scheme. That information was turned over to the FBI and was vital to the successful prosecution of petitioner. And the expenses were necessary because they were directed to investigating petitioner's offense and were reasonable in light of its magnitude and nature. Petitioner principally contends that "the investigation * * * of the offense" in Section 3663A(b)(4) refers exclusively to the *government's* investigation, but the statute does not include any such limitation. The term "investigation" does not naturally describe the work of the government alone. And Congress would have known that victims routinely contribute to the investigation of a crime before the government gets involved, as many federal decisions show.

Petitioner's interpretation of the term "investigation," and his related attempts to redefine other terms in Section 3663A(b)(4), would produce anomalous results that Congress would not have intended.

GE Capital was also entitled to recover its losses incurred while attending Dry Van's bankruptcy proceedings. Petitioner's fraud against GE Capital was the cause of the bankruptcy; the debts that Dry Van incurred to GE Capital through petitioner's fraud were Dry Van's greatest liability in the bankruptcy; and GE Capital's involvement in those proceedings reduced the amount of petitioner's restitution for unreturned loan principal. The statutory text does not limit "proceedings related to the offense" exclusively to criminal proceedings, and reading in that limitation would conflict with the statute's objective of full restitution in cases, like this one, where the crime forces victims to participate in additional proceedings.

Contrary to petitioner's contention, Section 3663A(b)(4) does not categorically deny restitution for attorney's and other professional fees. Section 3663A(b)(4)'s express identification of certain types of expenses recoverable in restitution—such as "child care" or "transportation"—illustrates the provision's breadth by covering expenses that might otherwise be overlooked. They do not, however, suggest any obvious or readily definable *limitation* that would justify narrowing the scope of the catchall provision. And Congress's allowance in other statutes of restitution for *all* attorney's fees incurred by victims of select crimes does not suggest that Congress disallowed restitution to MVRA victims who incur legal expenses in the investigation or prosecution of the offense or in related proceedings.

C. GE Capital's investigatory and legal losses are also recoverable in restitution under 18 U.S.C. 3663A(b)(1), which provides an alternative basis for affirming the judgment below. GE Capital's investigatory and legal expenses are part of its "property" that was "los[t]" as a "result[ ]" of petitioner's fraud offense. *Ibid.* Those losses were directly and proximately caused by petitioner's offense, and they were incurred in order to recover as much as possible of the tens of millions of dollars in property that petitioner stole from GE Capital through his fraud.

## ARGUMENT

### THE MVRA REQUIRED PETITIONER TO PAY RESTITUTION FOR GE CAPITAL'S INVESTIGATORY AND LEGAL EXPENSES CAUSED BY HIS FRAUD

The correct amount of restitution in this case is the full $15,970,517.37 that GE Capital lost as a result of petitioner's fraud. The MVRA requires petitioner to pay back not only the remaining loan principal of which GE Capital was deprived, but also the expenses that GE Capital incurred in unraveling the fraud and obtaining evidence that it passed along to the FBI, as well as the expenses that it incurred attempting to recover as much of the principal as it could in the bankruptcy proceedings. Those additional expenses were proximately caused by petitioner's fraud and in themselves render GE Capital the "victim" of the crime entitled to restitution under the MVRA. The district court was accordingly required to include those expenses in the restitution order both as "necessary * * * expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense" under 18 U.S.C. 3663A(b)(4), and as "property" whose "loss" was the "result[ ]" of petitioner's

offense under 18 U.S.C. 3663A(b)(1). In contending otherwise, petitioner would impose limitations on the statute —primarily, a requirement that the victim's expenses be requested or required by the government, and a categorical exclusion on recovery of attorney's and other professional fees—that appear nowhere in the MVRA's text and would subvert its basic purpose of making crime victims whole.

### A. GE Capital's Investigatory And Legal Expenses Entitled It To Restitution As A "Victim" Of Petitioner's Fraud

The MVRA provides that a court "shall order * * * that the defendant make restitution to the victim" in any case involving, *inter alia*, a "crime of violence" or an "offense against property" under various provisions of the federal criminal code, "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss." 18 U.S.C. 3663A(a)(1), (c)(1)(A), and (B). The Act broadly defines a "victim" to include any "person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered," including direct harms caused by the defendant's conduct "in the course of [a] scheme [or] conspiracy." 18 U.S.C. 3663A(a)(2). In this case, the direct and proximate harms to GE Capital from petitioner's criminal fraud consisted not only of the loss of its principal, but also the investigatory and legal expenses that it incurred attempting to recover the fraudulently loaned amounts. See 18 U.S.C. 3663A(b).

1. Before the MVRA, federal restitution was primarily governed by the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5, 96 Stat. 1253-1255, which gave sentencing courts discretion to order the defendant to make restitution to any victim of the offense, see 18 U.S.C. 3663(a)(1)(A) (as amended). In

determining whether to order restitution and how much, the VWPA directed sentencing courts to consider, *inter alia*, "the amount of the loss sustained by each victim as a result of the offense," as well as "the financial resources of the defendant." 18 U.S.C. 3663(a)(1)(B)(i).

The VWPA focused on restitution for the types of losses that victims most commonly experience. In cases involving offenses against property, the victim could recover the property or the value of the property. 18 U.S.C. 3663(b)(1). In 1994, Congress amended the VWPA by providing that a sentencing court may, "in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40504, 108 Stat. 1947 (18 U.S.C. 3663(b)(4)).

2. In 1996, Congress enacted the MVRA. For a wide range of offenses where the statute applies—including most violent and property offenses—the MVRA withdraws the availability of discretionary restitution under the VWPA and replaces it with a requirement of mandatory restitution. See 18 U.S.C. 3663A(a)(1) and (c)(1); 18 U.S.C. 3663(a)(1)(A) (Section 3663 does not apply to an "offense described in section 3663A(c)"). Because the MVRA covers most federal offenses with a victim, it controls restitution in tens of thousands of sentencing proceedings every year. See U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, S-36 Tbl. 15 (2017) (describing offenders sentenced to restitution by type of offense).

Although the MVRA makes restitution mandatory rather than discretionary for the covered offenses, the

statute otherwise largely replicates the VWPA. The MVRA's definition of "victim" as "a person directly and proximately harmed" by such an offense mirrors the VWPA's similar definition. 18 U.S.C. 3663A(a)(2); see 18 U.S.C. 3663(a)(2). And the categories of losses covered by the MVRA—including loss of property and expenses incurred participating in the investigation or prosecution of the offense—were also largely copied from the VWPA. Compare 18 U.S.C. 3663A(b), with 18 U.S.C. 3663(b).

The "substantive purpose" of the MVRA is "primarily to ensure that victims of a crime receive full restitution." *Dolan* v. *United States*, 560 U.S. 605, 612 (2010). The Senate Report accompanying the MVRA explained Congress's intent to provide "full restitution to all identifiable victims of covered offenses." S. Rep. No. 179, 104th Cong., 1st Sess. 18 (1995) (Senate Report). In particular, Congress deemed it "essential that the criminal justice system * * * , to the extent possible, ensure that [an] offender be held accountable to repay the[ ] costs" that his offense imposes "on the victim." *Ibid.* The MVRA makes that objective explicit in the statutory text by "provid[ing] that restitution shall be ordered in the 'full amount of each victim's losses' and 'without consideration of the economic circumstances of the defendant.'" *Dolan*, 560 U.S. at 612 (quoting 18 U.S.C. 3664(f)(1)(A)).

3. Petitioner does not dispute that his fraud consisted of crimes for which the MVRA mandates "that the defendant make restitution to the victim." 18 U.S.C. 3663A(a)(1); see 18 U.S.C. 3663A(c)(1). And the "ordinary meaning" of the statutory term "restitution" is "restoring" the victim "to [the] position [it] occupied before" the offense. *Hughey* v. *United States*, 495 U.S.

411, 416 (1990); see Catharine M. Goodwin, *Federal Criminal Restitution* § 2:1, at 16-17 (2017 ed.) (the fundamental principle of criminal restitution is that "the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being"); Senate Report 12-13; see also *Black's Law Dictionary* 1313 (6th ed. 1990) (restitution occurs when "a person is restored to his or her original position prior to loss or injury"); *Webster's Third New International Dictionary* 1936 (1993) ("restoration of a person to a former position or status").

The status of a "person" (including a corporation) as a "victim" entitled to restitution under the MVRA turns on whether that person suffered "direct[ ] and proximate[ ] harm[s]" that "result[ed from] the commission of [the] offense." 18 U.S.C. 3663A(a)(2); see *Robers* v. *United States*, 134 S. Ct. 1854, 1859 (2014) (noting the MVRA's "proximate cause requirement" in 18 U.S.C. 3663A(a)(2) and 18 U.S.C. 3664(e)); see also 1 U.S.C. 1 ("person" includes "corporation[ ]"). Here, GE Capital's direct and proximate harms included not only the remaining loss of principal, but also the investigatory and litigation expenses that GE Capital incurred in an effort to mitigate its harms from petitioner's fraud. Those additional losses bore "'a sufficiently close connection to the conduct' at issue" in the offense to trigger mandatory restitution under the MVRA. *Robers*, 134 S. Ct. at 1859 (quoting *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014)).

A proximate-causation inquiry of the sort relevant to criminal restitution "is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline* v. *United States*, 134 S. Ct.

1710, 1719 (2014). Here, it was it was entirely foreseeable to petitioner that his crime would require GE Capital to incur significant losses to unravel his fraud, determine its extent, and then recover what it could for its shareholders. See, *e.g.*, *United States* v. *Eyraud*, 809 F.3d 462, 468 (9th Cir. 2015) (defendant "should have anticipated * * * that unearthing the full consequences of her embezzlement would take additional time, effort, and money"); *United States* v. *Hosking*, 567 F.3d 329, 332 (7th Cir. 2009) ("The time and effort spent by the [victim's] employees and outside professionals in unraveling the [defendant's] twelve-year embezzlement scheme was a direct and foreseeable result of the defendant's conduct."); *United States* v. *Corey*, 77 Fed. Appx. 7, 9, 11-12 (1st Cir. 2003) (affirming restitution for "legal expenses associated with [defendant's] bankruptcy" because "[t]he loan was premised upon a sham and, as a matter of course, [the victim's] response to that fraud entailed routine legal expenses that are necessarily incurred when a heavily regulated secured lender mitigates its losses").

Petitioner knew or should have known that his Ponzi-like scheme—in which he used loans from GE Capital to create fake customer accounts to obtain tens of millions of dollars more from GE Capital—would eventually collapse. The scheme could never have lasted forever, and GE Capital would necessarily be left holding the bag. It was entirely to be expected that GE Capital would, at that point, make expenditures to separate petitioner's true statements from his falsehoods in order to determine the degree to which it had been duped and to learn the actual state of Dry Van's business. And in the inevitable bankruptcy—the eminently foreseeable result of a fraud that caused two-thirds (and $26 million) of Dry

Van's accounts receivable to be fictitious, see J.A. 38—GE Capital would necessarily incur expenses to recover as much as it could.

Petitioner does not meaningfully contest that GE Capital's investigatory expenses were caused by, and were the readily foreseeable result of, his crime. Petitioner does assert (Br. 32), however, that GE Capital's expenses in the bankruptcy proceedings are not recoverable because they were "directly caused by the *bankruptcy*" rather than by his fraud. That assertion—which is like saying that a battery victim's hospital bills were caused by her hospitalization rather than by the defendant's crime—cannot be reconciled with any sensible understanding of proximate causation. See *Paroline*, 134 S. Ct. at 1719. It was readily foreseeable that petitioner's crime would both cause Dry Van to go bankrupt and cause GE Capital—Dry Van's largest creditor and its primary source of capital—to incur significant expenses in those multi-million dollar bankruptcy proceedings.

Including GE Capital's investigatory and legal expenses in its losses as a "victim" of the offense takes account of petitioner's "conduct in light of the broader causal process that produced" those losses. *Paroline*, 134 S. Ct. at 1728. If restitution were limited to the value of Dry Van's unpaid loans as petitioner suggests, then even if petitioner repaid that amount, GE Capital would still have $4.895 million in losses that were directly and proximately caused by petitioner's offense. Petitioner's requested outcome would not fulfill the statutory mandate of full restitution or see GE Capital restored to its position before the offense.

4. Petitioner is wrong to suggest (Br. 31) that the definition of "victim" in Section 3663A(a)(2)—and the remainder of the MVRA—are irrelevant to determining

the proper measure of restitution under Section 3363A(b). "Statutory construction," this Court has explained, "is a holistic endeavor," and courts should interpret individual provisions in a manner that "produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); see *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986) (instructing that a court's interpretation of a statute "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (citation omitted); see also, *e.g.*, *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017).

This Court in *Robers* accordingly looked to provisions throughout the MVRA, and especially the statute's incorporation of principles of proximate causation, to interpret the restitution available under Section 3663A(b)(1). 134 S. Ct. at 1858-1859; see *Dolan*, 560 U.S. at 611-614 (considering multiple MVRA provisions to interpret a procedural requirement). Petitioner's blinkered readings of the loss categories in Section 3663A(b) are not only flawed on their own terms, see Sections B and C, *infra*, but also lose sight of the MVRA's overall structure. Section 3663A(b) does not mandate restitution for *all* losses proximately caused by the defendant's offense, but Congress set out loss categories that will effectuate the statute's overarching function to provide "full restitution." *Dolan*, 560 U.S. at 612. The MVRA as a whole—from the ordinary meaning of "restitution," to the expansive definition of "victim," 18 U.S.C. 3663A(a)(2), to the requirement of restitution for "the full amount of each victim's losses," 18 U.S.C. 3664(f)(1)(A)—thus

instructs sentencing courts to construe the loss categories in Section 3663A(b) in a manner that harmonizes the statute's provisions and makes them effective.

### B. GE Capital's Investigatory And Legal Expenses Are Recoverable In Restitution Under 18 U.S.C. 3663A(b)(4)

The investigatory and legal expenses that GE Capital incurred as a result of petitioner's fraud are recoverable through restitution under 18 U.S.C. 3663A(b)(4). That provision directs that an order of restitution must require the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." *Ibid.* A straightforward application of that statutory text encompasses the expenses at issue here.

#### *1. GE Capital incurred recoverable expenses when it participated in the investigation of petitioner's fraud*

GE Capital invested considerable resources investigating petitioner's fraud and enabling the government's later prosecution of it. As the court of appeals recognized —in accord with six other circuits—those losses were "expenses" that were both "necessary" and "incurred during participation in the investigation or prosecution of the offense." 18 U.S.C. 3663A(b)(4).[3]

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[3] See, *e.g.*, *United States* v. *Nosal*, 844 F.3d 1024, 1046-1047 (9th Cir. 2016) (internal "investigation costs and attorneys' fees" are recoverable if they are a "'direct and foreseeable result' of defendant's wrongful conduct") (citation omitted), cert. denied, 138 S. Ct. 314 (2017); *United States* v. *Janosko*, 642 F.3d 40, 42 (1st Cir. 2011) (Souter, J.) (cost of credit monitoring after data breach); *United States* v. *Elson*, 577 F.3d 713, 727-728 (6th Cir. 2009) (attorney's fees

a. When GE Capital discovered that petitioner had engaged in a complex conspiracy to fraudulently obtain tens of millions of dollars, it acted immediately "to investigate the extent of the fraud." J.A. 26. "Given the magnitude and nature" of the fraud, *ibid.*—in which petitioner obtained more than $25 million in fraudulent loans over 21 months, and took extensive steps to cover up his wrongdoing, J.A. 33-42—a thorough (and thus costly) investigation was required. GE Capital hired forensic investigators who preserved Dry Van's financial records, accounting system, accounts receivable and billing systems, and emails, thereby ensuring that key records were not lost or destroyed. J.A. 28-29. Financial consultants then untangled Dry Van's fraudulent accounting practices and "assist[ed] in determining [Dry Van's] true financial condition," J.A. 29, which required, among other things, figuring out which of its accounts were fraudulent and which were not. Attorneys further "assist[ed] in the investigation of [Dry Van's] fraud." J.A. 27-28.

As the government explained to the sentencing court, GE Capital's investigatory actions were "ultimately vital to the later prosecution." J.A. 18. The electronic data (including emails) preserved and analyzed by GE Capital's investigators helped the government

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incurred in "discovering and investigating" defendant's fraud in an attempt to recover lost funds); *Hosking*, 567 F.3d at 332 (7th Cir.) (bank's internal investigation costs); *United States* v. *Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009) (attorney's fees and accountant fees incurred during internal investigation of defendant's fraud); *United States* v. *Amato*, 540 F.3d 153, 159-160 (2d Cir. 2008) (attorney's fees and internal investigation costs), cert. denied, 556 U.S. 1138 (2009); *United States* v. *Phillips*, 477 F.3d 215, 224 (5th Cir.) (costs of internal damage assessment and of contacting other victims of data breach); cert. denied, 552 U.S. 820 (2007).

establish the factual basis for charging petitioner with a conspiracy count. See C.A. ROA 13-19 (Indictment). GE Capital's investigation also revealed how many times, and on what dates, petitioner caused fraudulent documents to be transmitted, which helped determine how many counts of wire fraud to charge against petitioner and the factual basis for each count. See *id.* at 20 (Indictment) (charging petitioner with five counts of wire fraud for five fraudulently transmitted documents on particular dates). GE Capital's investigators further supported the prosecution by "determin[ing] the actual amount of [petitioner's] fraud," J.A. 18, which affected, among other things, petitioner's offense level under the Sentencing Guidelines. See J.A. 48. And had petitioner not pleaded guilty, the material preserved and analyzed by GE Capital's investigation would have been a critical part of the evidence against petitioner at trial.

The amounts that GE Capital spent on the investigation of petitioner's criminal fraud were thus "expenses incurred during participation in the investigation or prosecution of the offense." 18 U.S.C. 3663A(b)(4). The ordinary meaning of the term "expense"—"[t]hat which is expended in order to secure a benefit or bring about a result"—readily encompasses such expenditures. *Black's Law Dictionary* 577; see *Webster's Third New International Dictionary* 800 (defining "expense" as "the financial burden involved typically in a course of action"). Those expenses were incurred when GE Capital "participat[ed]" in "the investigation" of petitioner's offense—indeed, it was the driving force in the initial phase of the investigation, before the investigation was handed over to federal officials. Without GE Capital's participation, the investigation and prosecution of petitioner's fraud may not have been as speedy or as successful. And as

both lower courts recognized, the expenses here were "necessary": they were appropriate under the circumstances and were useful to unraveling petitioner's fraud and bringing him to justice. See Pet. App. 4a; *id.* at 39a; see also *Black's Law Dictionary* 1029 (defining "necessary" as "that which is * * * convenient, useful, appropriate, suitable, proper, or conducive to the end sought").

b. Petitioner's efforts to avoid restitution for GE Capital's investigatory expenses center on his contention that Section 3663A(b)(4)'s reference to "the investigation" of the offense must refer exclusively to "the *government's* investigation." Pet. Br. 17 (citation omitted). The D.C. Circuit decision on which petitioner relies took that premise as a given, because neither party contested it in that case. See *United States* v. *Papagno*, 639 F.3d 1093, 1098 (2011). But the text of Section 3663A(b)(4) does not say "the government's investigation," and petitioner presents no sound reason to infer that extratextual limitation.

The definition of "investigation" is broad and not limited to the government's work. See *Black's Law Dictionary* 825 (defining "investigation" as "[t]he process of inquiring into or tracking down through inquiry"); *Webster's Third New International Dictionary* 1189 (a "detailed examination" or "a searching inquiry"). Nothing in the statutory text suggests Congress believed that "the investigation" of a crime is comprised only of government agents, or that it cannot begin until the government gets involved. Indeed, the text of Section 3663A(b)(4) does not even dictate that only one "investigation" may occur. See 1 U.S.C. 1 (by default, "words importing the singular include and apply to several persons, parties, or things").

As Congress presumably recognized, and as this case illustrates, victims are often better positioned than the government to move quickly to investigate crime. GE Capital's prompt action played a critical role in the investigation by preserving crucial evidence and revealing the extent of the fraud. J.A. 18. GE Capital's efforts thus were not "entirely separat[e]" from the criminal investigation (Pet. Br. 21), but were instead the first phase of "the investigation * * * of the offense." Especially (but not exclusively) in fraud cases, many "government investigations would not occur if it were not for the prior internal investigation of the victim." *Federal Criminal Restitution* § 7:36, at 376.

Congress would have understood that criminal prosecutions commonly occur as a result of the victim's internal investigation. In *United States* v. *Hosking*, for example, the defendant "confessed" to embezzling $135,000 from her employer, but the victim's internal investigation revealed that she had actually embezzled more than $500,000, see 567 F.3d at 330-331, and the court of appeals accordingly determined that the victim's "investigation was clearly an important part of 'the investigation ... of the offense,'" *id.* at 332 (quoting 18 U.S.C. 3663A(b)(4)). In *United States* v. *Herrera*, 606 Fed. Appx. 748 (5th Cir. 2015) (per curiam), the victim discovered the defendant's theft through an annual audit, then uncovered the full extent of her theft in an investigative audit and referred the matter to the FBI. See *id.* at 750. And in *United States* v. *Qurashi*, 634 F.3d 699 (2d Cir. 2011), the victim's internal investigation detected that the defendant's insurance claims were fraudulent. The magistrate judge found that, without the victim's investigation expenses, "the complexities of the fraud engaged in by Defendant might never have

been fully resolved, nor would Defendant's prosecution have been as effective." *United States* v. *Qurashi*, No. 05-CR-498, 2009 WL 10677000, at *19 (E.D.N.Y. Sept. 1, 2009).[4]

Congress in Section 3663A(b)(4) accordingly addressed expenses incurred in both the "prosecution of the offense," which only the government can initiate, and in "the investigation * * * of the offense," which naturally could either involve the government or not. 18 U.S.C. 3663A(b)(4). Section 3663A(b)(4) likewise authorizes restitution for other expenses that do not require government direction or mandate by allowing recovery for victims' expenses for "attendance at proceedings related to the offense." *Ibid.* After passage of the MVRA, Congress has affirmed and codified victims' rights with respect to certain criminal proceedings—for example, "to be reasonably heard" at a defendant's sentencing proceeding—and those rights do not depend on government request. 18 U.S.C. 3771(a)(3) and (4).

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[4] See also, *e.g.*, *United States* v. *Cuti*, 778 F.3d 83, 88 (2d Cir. 2015) (victim disclosed results of its internal investigation to the U.S. Attorney's Office); *United States* v. *Bahel*, 662 F.3d 610, 620 (2d Cir. 2011) (victim prepared "a report detailing" procurement fraud and "referred the report to the United States Attorney's Office"); *Amato*, 540 F.3d at 162 (law firm "assisted [the victim] in completing its internal investigation of the fraud and then reporting the fraud to the government"); *United States* v. *Adcock*, 534 F.3d 635, 643 (7th Cir. 2008) (victim's audit "uncovered [the] wrongdoing"); *United States* v. *DeRosier*, 501 F.3d 888, 895 n.11 (8th Cir. 2007) (victim "provided the results of its own internal investigation to the FBI"); *United States* v. *Dwyer*, 275 Fed. Appx. 269, 270 (5th Cir.) ("[t]he fruits of [the victim's] investigation were turned over to the F.B.I. and the U.S. Attorney's Office, enabling the government to prosecute [defendant] without conducting a significant investigation"), cert. denied, 553 U.S. 1043 (2008).

Petitioner's narrow reading of "the investigation * * * of the offense" would produce anomalous results. See *Dolan*, 560 U.S. at 620 (the MVRA should not be read to "create[ ] a serious statutory anomaly"). According to petitioner, a victim like GE Capital that is proactive in investigating fraud and then shares its investigation with the government cannot receive restitution, whereas a victim that drags its feet and must be prodded (or even compelled) to provide information would receive restitution. Petitioner's position would also appear to preclude restitution for expenses incurred by, for example, a violent-crime victim during her initial cooperation with *state* law enforcement, before the matter is referred to federal authorities.

The implications of petitioner's approach make little sense and are not consistent with the guiding principle of restitution—restoring the victim to its rightful position. From the standpoint of restitution, it makes no difference whether the victim was forced to incur additional expenses soon after the defendant's crime to prevent destruction of critical evidence and uncover the extent of the loss, or whether the victim incurred those expenses later because the government asked for its assistance. In both cases, the victim's losses were a direct and proximate result of the criminal offense, and allowing restitution for those losses is the only way to provide "full" restitution that restores the victim to its position before the offense. 18 U.S.C. 3664(f)(1)A).

c. Petitioner also contends (Br. 19) that the term "participation in," in the context of "the investigation of the offense," can refer only to "taking part in the government's work." As a threshold matter, that contention assumes petitioner's (incorrect) premise that "the

investigation" means only "the government's investigation." But even if "the investigation" did mean "the government's investigation," restitution under 18 U.S.C. 3663A(b)(4) still would not require that the victim's investigation expenses be requested or required by the government.

"Participate" is a "term[ ] and concept[ ] of breadth," *Russello* v. *United States*, 464 U.S. 16, 21-22 (1983). It commonly means "to take part in" something—not to have sole or even "primary" responsibility for it. *Reves* v. *Ernst & Young*, 507 U.S. 170, 179 (1993) (citation omitted); see *Webster's Third New International Dictionary* 1646 ("to take part in something (as an enterprise or activity) usu[ally] in common with others"). Under that standard definition, a victim can, for example, "take part in" the investigation of a criminal offense by preserving evidence and uncovering the defendant's conduct even before the victim starts actively cooperating with law enforcement.[5]

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[5] The D.C. Circuit in *Papagno* pointed out that this Court concluded in *Reves* that "participate" is not synonymous with "aid and abet." 639 F.3d at 1098 (quoting 507 U.S. at 178-179). *Reves* addressed the phrase "participate, directly or indirectly in the conduct of [an] enterprise's affairs" in 18 U.S.C. 1962(c). The Court held that "participate" had a narrower meaning than "aid and abet," which would "comprehend[ ] all assistance rendered by words, acts encouragement, support or presence." *Reves*, 507 U.S. at 178 (quoting *Black's Law Dictionary* 68 (6th ed. 1990)). But the Court recognized that "participate" is a "term of breadth" and that the statute's application was "not limited to those with primary responsibility for the enterprise's affairs." *Id.* at 178-179 (brackets, citation, and ellipsis omitted). Petitioner here does not contend that GE Capital's actions were too insubstantial to constitute "participation"; he instead argues that no actions by a victim can qualify as "participation" unless requested by the government.

The phrase "participation in the investigation or prosecution" is not without some limits, cf. Pet. Br. 20, and determining whether a victim's unprompted contribution to the investigation or prosecution was sufficient to constitute "participation" will depend on all the facts and circumstances. But petitioner offers no evidence that courts in the seven circuits that allow restitution in circumstances like those here have encountered substantial difficulty making that determination. Among other things, sentencing courts can call upon the "remarkable expertise" of the Probation Office, Hon. William H. Pryor Jr., *The Integral Role of Federal Probation Officers in the Guidelines System*, Federal Probation 15 (Sept. 2017), and refer disputed issues regarding restitution to a magistrate judge for proposed findings of fact and recommendations. 18 U.S.C. 3664(d)(6). The burden of proof is also ultimately on the government to demonstrate the amount of the victim's loss. 18 U.S.C. 3664(e). The government met that burden here by showing that GE Capital played a vital role in the investigation of petitioner's offense, which was sufficient by any measure to show GE Capital's "participation."

d. Petitioner further contends (Br. 21) that GE Capital's expenses were not incurred "during" the investigation of petitioner's offense because they were incurred before the government's own investigation began. That contention again assumes petitioner's first and erroneous premise that the "the investigation" means "the government's investigation."

In any event, petitioner's reading of "during" is unsound for other reasons. Petitioner perceives (Br. 22) a "critical" distinction between the preexisting text of the VWPA, which refers to "expenses related to participation in the investigation," 18 U.S.C. 3663(b)(4), and the

text of the MVRA, which refers to "expenses incurred during participation in the investigation," 18 U.S.C. 3663A(b)(4). But as this Court has recently recognized in rejecting a similar preposition-focused argument, even within the context of a single statute, "there is no 'canon of interpretation that forbids interpreting different words used in different [provisions] to mean roughly the same thing.'" *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 845 (2018) (rejecting suggested distinction between "for" and "pending") (quoting *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013)). Multiple courts of appeals have accordingly found no meaningful difference between Section 3663(b)(4) and Section 3663A(b)(4). See, *e.g.*, *Hosking*, 567 F.3d at 331 n.2 (the provisions are "functionally identical"); *United States* v. *Juvenile Female*, 296 Fed. Appx. 547, 549 n.1 (9th Cir. 2008) (the provisions are "substantially the same").

Moreover, petitioner's suggestion that the MVRA allows *less* restitution for victims' investigative expenses than did the VWPA is at odds with the MVRA's overarching objective "to expand, rather than limit, the restitution remedy." *United States* v. *Ekanem*, 383 F.3d 40, 44 (2d Cir. 2004). On petitioner's view, Congress identified offenses sufficiently important to warrant mandatory restitution, yet withdrew a form of restitution that courts could previously have ordered for those offenses as a matter of discretion (and can still order for offenses not covered by the MVRA). The "MVRA's clear purpose," however, "was to increase the frequency of restitution, not reduce it." *Federal Criminal Restitution* § 5:4, at 148; see *United States* v. *Martin*, 128 F.3d 1188, 1190 (7th Cir. 1997) (the criminal restitution statutes do not have "a history marked by steady congressional erosion, but rather by constant expansion").

e. Petitioner also contends (Br. 23) that a victim's expenses are not "necessary" when they are not requested or required by the government. That contention yet again assumes petitioner's initial premise that the provision is limited to government investigations. And it would be flawed even if that premise were correct. The term "necessary" applies to every expense covered by 18 U.S.C. 3663A(b)(4) except "lost income," including, for example, "transportation" or "child care" expenses incurred for "attendance at proceedings related to the offense." On petitioner's reading of "necessary," a victim who attends the defendant's criminal trial—as he or she has a right to do under 18 U.S.C. 3771(a)(3)—could not receive restitution for transportation or child-care costs unless the government specifically requested the victim to attend.

The modifier "necessary" in Section 3663A(b)(4) requires only that the victim's costs be "appropriate" under the circumstances and "reasonably useful" to the investigation or prosecution of the defendant's offense or to attendance at related proceedings. *Black's Law Dictionary* 1029; *Eyraud*, 809 F.3d at 467-468 (expenses under Section 3663A(b)(4) must be "reasonably necessary to aid in the investigation or prosecution of the defendant") (citation omitted); *United States* v. *Maynard*, 743 F.3d 374, 381 (2d Cir. 2014) ("'necessary'" expenses are those that "the victim was required to incur to advance the investigation or prosecution of the offense," even if the expenses were not "requested by the government"). This Court has explained that a "necessary" expense in federal law can mean "an expense that is merely helpful and appropriate," and the Court has accordingly interpreted a statutory reference to "reasonably necessary" services to call for "a determination by

the district court, in the exercise of its discretion," as to whether the services were "sufficiently important." *Ayestas* v. *Davis*, No. 16-6795, 2018 WL 1402425, at *10 (Mar. 21, 2018) (citing *Commissioner* v. *Tellier*, 383 U.S. 687, 689 (1966), interpreting 26 U.S.C. 162(a) (1964)). Section 3663A(b)(4) uses "necessary" in much the same way.

Section 3663A(b)(4)'s "necessary" requirement does, of course, preclude restitution for expenses that "served no investigatory purpose," even if they were caused by the defendant's offense. *Maynard*, 743 F.3d at 381 (affirming restitution for a victim's internal-investigation expenses while disallowing other expenses). The term "necessary" also excludes expenses that are "disproportionate to the task." *United States* v. *Nosal*, 844 F.3d 1024, 1047-1048 (9th Cir. 2016) (affirming restitution for a victim's "internal investigation costs to uncover the extent of the breach" while distinguishing other expenses), cert. denied, 138 S. Ct. 314 (2017). Section 3663A(b)(4) does not cover the cost for the victim to arrive at the hearing in a stretch limousine, or the cost of hundreds of law-firm billable hours to investigate $50 missing from the cash register. Courts actively enforce these limits, as in *Maynard* and *Nosal*. But both lower courts here determined that GE Capital's expenses were reasonably appropriate and helpful in light of the fact that GE Capital's investigation set out to untangle petitioner's complex scheme to fraudulently obtain more than $25 million.

f. Finally, petitioner's reliance (Br. 5, 27) on a 2008 amendment to the VWPA that allows restitution for "the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense," is misplaced.

Identity Theft Enforcement and Restitution Act of 2008, Pub. L. No. 110-326, § 202, 122 Stat. 3561 (18 U.S.C. 3663(b)(6)). Contrary to petitioner's suggestion (Br. 27), that amendment does not indicate that Congress had previously restricted restitution under 18 U.S.C. 3663A(b)(4) to expenses required or requested by the government. Section 3663(b)(6) does not refer to internal investigations at all, but instead to the "time value" of remediation efforts by identity-theft victims—who are nearly always "individual[s]," 18 U.S.C. 1028(d)(3), (4), and (7); see 18 U.S.C. 1028(a), 1028A(a).

Congress understood that identity-theft victims must often spend months or years rehabilitating their damaged creditworthiness or monitoring to prevent additional losses, and it sought to ensure that the time value of doing so was included as a harm for which restitution could be ordered. See *Identity Theft: Innovative Solutions for an Evolving Problem: Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security of the Senate Comm. on the Judiciary*, 110th Cong., 1st Sess. 111 (2007) (statement of Ronald J. Tenpas) (describing proposed amendment submitted by Department of Justice). But the sentencing court here did not order restitution for the "time value" of all of GE Capital's remediation efforts; it ordered recovery only for GE Capital's actual expenses incurred when it participated in the investigation of petitioner's offense. Nothing in the 2008 statute suggests that Congress believed that victims who investigate a crime and hand over the results to federal authorities should be denied restitution for those expenses under Section 3663A(b)(4).

*2. GE Capital incurred recoverable expenses when it attended Dry Van's bankruptcy proceedings*

After petitioner's fraud drove Dry Van into bankruptcy, GE Capital was forced to spend millions of dollars attempting to recover as much of its loan principal as possible in the bankruptcy proceedings. Those efforts—which significantly *reduced* the amount of principal that petitioner would otherwise have owed as restitution—are recoverable in restitution as "necessary * * * expenses incurred during * * * attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4). The MVRA should not be interpreted to put GE Capital in a worse position, for purposes of restitution, for having attempted to mitigate its losses in the bankruptcy proceedings.

a. As petitioner recognizes (Br. 10), "[t]he fraud * * * caused petitioner's companies to file for bankruptcy." Once that happened, GE Capital could not reasonably have avoided the bankruptcy proceedings. Among other reasons, GE Capital had no other way to meaningfully mitigate its losses. See *Czyzewski*, 137 S. Ct. at 979 (explaining that, under 11 U.S.C. 362(a), "an 'automatic stay' of all collection proceedings against the debtor takes effect" upon filing a Chapter 11 bankruptcy petition). No victim with the ability to appear—and in particular, no public-corporation victim with a duty to recover for its shareholders—would have sat out the bankruptcy proceedings.

GE Capital's expenses in the bankruptcy proceedings bore an especially close connection to petitioner's offense in the circumstances of this case. The discharge of Dry Van's debts overwhelmingly concerned money that had been obtained through petitioner's fraud. See J.A. 38 (estimating that of $37.266 million in accounts receivable claimed by Dry Van, $26.725 million was

fraudulent). As a result, the amounts paid by Dry Van to GE Capital in bankruptcy directly affected the amount of restitution that petitioner owed as part of his criminal sentence. Thus, although petitioner defrauded GE Capital of more than $26 million, see J.A. 48, by the end of the bankruptcy proceedings, GE Capital was owed $11.074 million, see J.A. 70, an amount that petitioner concedes his obligation to repay in restitution, see Br. 11 n.5. That $11.074 million figure might have been higher—potentially by millions of dollars—had it not been for GE Capital's active role in the bankruptcy proceedings with the assistance of counsel.

b. The amounts that GE Capital spent in the bankruptcy proceedings were "expenses incurred during * * * attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4). A bankruptcy case, like any matter in litigation, involves "proceedings." *Black's Law Dictionary* 1204 (defining "proceeding" as "the form and manner of conducting juridical business before a court or judicial officer"). The bankruptcy proceedings here were "related to the offense" because they were intimately "connected" to the offense. *Id.* at 1288 (defining "related"). As petitioner himself recognizes (Br. 10), his fraud was the cause in fact of the bankruptcy proceedings because it triggered them; and it was also the proximate cause because the proceedings were readily foreseeable to petitioner, see pp. 19-21, *supra*. The term "attendance" naturally encompasses participatory attendance (*e.g.*, "attendance at a meeting"), and Congress plainly intended to use the term that way.

The phrase "attendance at" (used in connection with "proceedings") is broader, not narrower, than the phrase "participation in" (used in connection with the

"investigation" or "prosecution"). It would be anomalous to conclude that a crime victim is entitled to restitution if he simply shows up at a proceeding related the offense, but forfeits that right if he speaks at or otherwise contributes to that proceeding, which he has a statutory right to do. See 18 U.S.C. 3771(a)(4). Nor can "attendance" costs reasonably be limited to costs incurred at the hearing itself; "transportation," for example, is expressly covered, see 18 U.S.C. 3663A(b)(4), and reasonable preparation time would be as well. And particularly where, as here, a victim is not an individual, it can "attend" a hearing by sending an attorney acting on its behalf. Indeed, in the context of proceedings like a bankruptcy, any meaningful form of "attendance" necessarily requires an attorney.

The lower courts thus correctly determined that GE Capital's expenses for attorney representation in the bankruptcy proceedings were "necessary" expenses covered by the statute, 18 U.S.C. 3663A(b)(4). As GE Capital explained to the district court, it needed to appear in the bankruptcy proceedings "to protect its rights and preserve its collateral." J.A. 27. And GE Capital's bankruptcy expenses were additionally necessary because the bankruptcy courts ordered GE Capital to continue making advance payments to Dry Van. See J.A. 24.

c. Contrary to petitioner's contention (Br. 18), the phrase "proceedings related to the offense" in Section 3663A(b)(4) is not limited exclusively to *criminal* proceedings. Congress could have included the modifier "criminal," but did not do so. Indeed, although Section 3663A(b)(4) elsewhere refers to the "prosecution of the offense," Congress employed the broader term "proceedings related to the offense" in this clause. 18 U.S.C. 3663A(b)(4).

Petitioner argues (Br. 19) that it would not serve "Section 3663A's aims" to allow restitution for a victim's losses in non-criminal proceedings. But as this Court has explained, Section 3663A's aim is to enable victims to "receive full restitution" that restores them to their position before the offense. *Dolan*, 560 U.S. at 612. Congress evidently recognized that, among the wide variety of crimes covered by the MVRA, some crimes proximately cause victims to incur expenses in noncriminal "proceedings related to the offense." Especially where attendance at those proceedings is necessary, as it was here, to remediate the harm of the offense itself, the expenses associated with that attendance are properly understood as losses recoverable by the victim in restitution. Cf. Restatement (Second) of Torts § 919(2) (1979) ("One who has already suffered injury by the tort of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert further harm.").

Cases in which the provision has been applied illustrate the point. In *United States* v. *Cummings*, 281 F.3d 1046 (9th Cir. 2002), for example, the defendant kidnapped the victim's children overseas in violation of the International Parental Kidnapping Crime Act of 1993, 18 U.S.C. 1204, and the court of appeals affirmed restitution for the victim's attorney's fees in two proceedings attempting to get the children back. 281 F.3d at 1048, 1052.[6] In *United States* v. *Eyraud*, the defendant embezzled funds from her employer that were for

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[6] *Cummings* applied the restitution provision in 18 U.S.C. 3663(b)(4) because Section 3663A did not apply to the offense of conviction. But multiple courts have recognized that there is no meaningful difference between 18 U.S.C. 3663(b)(4) and 18 U.S.C.

the Internal Revenue Service, thereby causing the victim to incur significant tax deficiencies and penalties, and the victim received restitution for attorney's fees incurred while working with the IRS to resolve the tax problems. See 809 F.3d at 465-469; Gov't C.A. Br. at 7-8, *Eyraud*, *supra* (No. 14-50261). And in *United States* v. *Skowron*, 839 F. Supp. 2d 740 (S.D.N.Y. 2012), the district court held that the victim was entitled to restitution for its expenses incurred while participating in a Securities and Exchange Commission civil investigation that resulted from the defendant's insider-trading scheme and cover-up. See *id.* at 745, 747-749. The court also ordered restitution under Section 3663A(b)(4) for legal fees that the victim was legally and contractually obligated to advance to the defendant (its employee) while he maintained his innocence. See *id.* at 748.

***3. The MVRA does not categorically deny restitution for attorney's fees and other professional fees***

In addition to petitioner's efforts to engraft extratextual limitations onto terms like "investigation" and "proceedings," he also launches a broader attack (Pet. Br. 24-26) on restitution by arguing that victims can never receive restitution under Section 3663A(b)(4) for "professional fees," including fees for "attorneys, auditors, [or] forensic accountants." Petitioner's argument lacks merit.

a. Petitioner first invokes (Br. 25) the statutory canon of *ejusdem generis* and contends that professional fees are not "comparable" to the expenses that

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3663A(b)(4). See, *e.g.*, *Hosking*, 567 F.3d at 332 n.2 (the provisions are "functionally identical"); *Juvenile Female*, 296 Fed. Appx. at 549 n.1 (9th Cir.) (extending *Cummings*'s reasoning to a restitution award under Section 3663A(b)(4)).

Section 3663A(b)(4) explicitly mentions—"lost income," "child care," and "transportation" expenses—because they are not "minor" and "incidental." But the *ejusdem generis* canon does not apply where, as here, the statute's specific terms "do not fit into any kind of definable category." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 209 (2012); see *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 225 (2008) (rejecting application of *ejusdem generis* in part because "no relevant common attribute immediately appears from [the general] phrase"). In Section 3663A(b)(4), there is no "obvious and readily identifiable genus," *Reading Law* 199, linking "lost income," "child care," and "transportation" expenses, save the fact that they are all "expenses that one might conceivably incur while participating in an investigation or prosecution or attending proceedings." *United States* v. *Amato*, 540 F.3d 153, 160-161 (2d Cir. 2008), cert. denied, 556 U.S. 1138 (2009). Petitioner's attempt to group those expenses under the heading of "minor" and "incidental" (Br. 25) does not suffice because a victim's lost income, in particular, might be quite substantial depending on the magnitude of the defendant's offense and the scope of the investigation and prosecution. See, *e.g.*, *Juvenile Female*, 296 Fed. Appx. at 549 (victim's mother missed seven months of work while searching for her son before learning he had been murdered).

It would, moreover, be highly anomalous for Congress to have provided restitution for "incidental" or "minor" expenses while ignoring "direct" or "major" expenses—thereby remedying only the apparently more trivial and tangential forms of harm. Far more likely is that Congress was particularly concerned that

courts would overlook lost income, child care, or transportation expenses "unless th[o]se items were specifically named," *Amato*, 540 F.3d at 161, and enumerated them in order "to remove any doubt" about their eligibility for restitution, *Ali*, 552 U.S. at 226. Attorney's fees and accounting costs, by contrast, would not likely have been overlooked because they are so obviously associated with a victim's participation in the investigation and prosecution of an offense, especially a fraud offense like the one here. See *Amato*, 540 F.3d at 161.

Petitioner's *ejusdem generis* argument would also have the unwarranted effect of denying restitution even to victims who incur substantial costs in response to requests for assistance from the government. Although victims regularly incur expenses during the investigation of an offense before the government gets involved (as shown above), victims also cooperate with the government in the investigation and prosecution, and they will often bring lawyers with them to interact with prosecutors or government regulators. See, *e.g.*, *United States* v. *Cuti*, 778 F.3d 83, 88 (2d Cir. 2015) (affirming restitution for the victim's attorney's fees incurred "cooperat[ing] in the [government's] investigation" by "attending meetings[,] * * * participating in telephone calls, and responding to numerous requests for documents and information"). Requiring victims to bear that cost with no possibility of restitution would both be deeply inequitable and would frustrate Congress's stated objective to obtain the participation of victims in criminal prosecutions. See VWPA § 2(a)(1), 96 Stat. 1248 ("Without the cooperation of victims and witnesses, the criminal justice system would cease to function.").

b. Petitioner next attempts (Br. 27) to categorically exclude attorney's fees from Section 3663A(b)(4) on the

ground that certain offenses have their own offense-specific restitution provisions that specifically mention attorney's fees. See, *e.g.*, 18 U.S.C. 2259(b)(3) (restitution for victims of child pornography). But as this Court has recognized, Congress's offense-specific restitution statutes have a distinct structure: they require restitution for "the full amount of the victim's losses" and then define that term to "include[ ]" particular costs, including "attorney's fees, as well as other costs incurred," and "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(1) and (3); see *Paroline*, 134 S. Ct. at 1718-1721; see also 18 U.S.C. 2248, 2264.

The availability of restitution for *any* attorney's fees proximately caused by a child-pornography offense and certain other offenses does not suggest that victims of most crimes can *never* receive restitution for attorney's fees, or other professional fees, as "expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense" under 18 U.S.C. 3663A(b)(4). The statutes define restitution in different ways, and no reason exists to interpret the availability of restitution under one as foreclosing it under the other. The child-pornography statute also lists, for example, "temporary housing" as eligible for restitution, 18 U.S.C. 2259(b)(3)(C), but an MVRA victim's housing costs would be recoverable under the text of Section 3663A(b)(4) if she travels to another city to cooperate with law enforcement in the investigation or prosecution. Conversely, the child-pornography statute does not specifically list expenses incurred by participating in the investigation of the offense, but such expenses would nevertheless be recoverable in restitution as "other losses" proximately

caused by the offense, notwithstanding the MVRA's more specific provision.

Restitution under the MVRA is not fully coextensive with restitution under the child-pornography and other offense-specific restitution statutes because the MVRA requires the victim's losses to fall within a category in Section 3663A(b). Within those categories, however, Congress borrowed from the text of the offense-specific restitution statutes by requiring restitution for "the full amount of [the] victim's losses. 18 U.S.C. 3664(f)(1)(A).[7]

c. Petitioner's last objection (Br. 26) to restitution for victims' professional fees is that such fees can comprise "significant sums" that are difficult for defendants to repay. But the amount of GE Capital's losses here was a function of the magnitude and nature of petitioner's offense, which involved fraudulently obtaining tens of millions of dollars, disguising his conduct, and plunging Dry Van into years of bankruptcy proceedings. As explained above, GE Capital's expenses on professionals during the investigation and in those bankruptcy proceedings were necessary to unravel the crime and mitigate GE Capital's losses, and the bankruptcy attorney's fees, in particular, had the effect of

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[7] Petitioner errs in invoking (Br. 19 n.6) the principle that a deviation from the "American Rule" of attorney's fees—under which each party in a civil case bears its own fees—requires an explicit instruction from Congress. See *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015). This Court has never held that such a clear-statement rule applies to Congress's criminal restitution statutes, which "serve[ ] purposes that differ from (though they overlap with) the purposes of" civil law. *Paroline*, 134 S. Ct. at 1724; see *id.* at 1724, 1726 (noting "the manifest procedural differences between criminal sentencing and civil tort lawsuits" and that restitution "serves punitive purposes" as well as compensatory).

directly reducing the amount of petitioner's (undisputed) restitution obligation for the unpaid loans. See pp. 36-37, *supra*. Petitioner's arguments (Br. 7-9, 26) about the adverse effects on the criminal-justice system of large restitution orders simply take issue with Congress's deliberate choices in the MVRA to make restitution mandatory, 18 U.S.C. 3663A(a), and to require "full" restitution "without consideration of the economic circumstances of the defendant," 18 U.S.C. 3664(f)(1)(A).

***4. The rule of lenity does not support petitioner's requested limitations on restitution***

Petitioner finally contends that the rule of lenity requires interpreting the MVRA "against increased punishment." Br. 31 (citing *Hughey*, 495 U.S. at 412-413). But this Court has explained that the rule of lenity comes into play "only if, after using the usual tools of statutory construction, [the Court is] left with a 'grievous ambiguity or uncertainty in the statute.'" *Robers*, 134 S. Ct. at 1859 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998)); see *Dolan*, 560 U.S. at 621. No such circumstance exists here.

The Court has previously declined to apply the rule of lenity to multiple provisions of the MVRA. In *Dolan*, the Court found no ambiguity "sufficiently 'grievous' to warrant" application of the rule of lenity "after considering the statute's text, structure and purpose," 560 U.S. at 621, even though the text seemingly created a mandatory rule in the defendant's favor, *id.* at 607-608. In *Robers*, the Court applied traditional tools of statutory construction and interpreted the statute in favor of greater restitution, rejecting the defendant's argument based on the rule of lenity. 134 S. Ct. at 1859.

Section 3663A(b)(4) similarly does not warrant application of the rule of lenity, because it is not ambiguous,

let alone grievously so. The MVRA's text, structure, and purpose all confirm that the statute makes restitution broadly available for the victim's losses. See *Dolan*, 560 U.S. at 612. Congress mandated restitution here because GE Capital incurred necessary expenses when it participated in the investigation of petitioner's offense, and then incurred necessary losses in bankruptcy proceedings that were directly and proximately related to the offense. The lower courts' interpretation of Section 3663A(b)(4) adheres to the ordinary meaning of "restitution" by restoring the victim to the position it occupied before petitioner's offense, and it is most consistent with the statutory mandate of restitution for the "full amount of each victim's losses." *Dolan*, 560 U.S. at 612 (quoting 18 U.S.C. 3664(f)(1)(A)).

### C. The District Court's Restitution Order Is Independently Supported By 18 U.S.C. 3663A(b)(1)

Although the lower courts in this case applied circuit precedent to hold that restitution for GE Capital's investigative and legal expenses was proper under 18 U.S.C. 3663A(b)(4), other courts of appeals would order restitution for GE Capital's losses by applying 18 U.S.C. 3663A(b)(1).[8] Thus, as the government observed in its opposition to the petition for a writ of certiorari, see Br. in Opp. 7, 12-13, Section 3663A(b)(1) provides an additional basis for affirming the judgment in this case. See, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984) ("[This Court] may affirm on any ground that the law and the

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[8] See, *e.g.*, *Hosking*, 567 F.3d at 332 (7th Cir.) (investigation costs for attorneys and accounting consultants); *United States* v. *Scott*, 405 F.3d 615, 618-620 (7th Cir. 2005) (audit fees); *United States* v. *Abdelbary*, 746 F.3d 570, 579 (4th Cir. 2014) (legal fees); *Corey*, 77 Fed. Appx. at 12 (1st Cir.) (legal fees).

record permit and that will not expand the relief granted below."); *Schweiker* v. *Hogan*, 457 U.S. 569, 584-585 & n.24 (1982) (an appellee may assert an argument "for the first time" in this Court "as a basis on which to affirm [the lower] court's judgment" and the argument "may be decided on the basis of the record developed in [the lower] court").

1. Section 3663A(b)(1) provides that "in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense," the sentencing court "shall require" that the defendant "return the property to the owner of the property * * * ; or," if return of the property "is impossible, impracticable, or inadequate, pay an amount equal to" "the value of the property," less "the value * * * of any part of the property that is returned." 18 U.S.C. 3663A(b)(1).

Petitioner's fraud offense "result[ed] in damage to or loss or destruction of property" of GE Capital. 18 U.S.C. 3663A(b)(1). GE Capital's money is its "property," as petitioner necessarily recognizes in acknowledging that restitution is warranted for the $11.074 million in fraudulently obtained loans that remained unpaid at sentencing. See *Robers*, 134 S. Ct. at 1856. And the additional $4.895 million of GE Capital's property at issue here, which was spent in efforts to recover that fraudulently obtained principal, was likewise "los[t]" as a "result[ ]" of the "offense," 18 U.S.C. 3663A(b)(1). See *Robers*, 134 S. Ct. at 1857 (the words "the property" in Section 3663A(b)(1) "naturally * * * refer to the 'property' that was 'damaged,' 'lost,' or 'destroyed' as a result of the crime") (brackets and citation omitted). As discussed above, pp. 36-37, *supra*, those additional expenses were necessary to reduce the amount of unpaid principal that petitioner owed.

Section 3663A(b)(1) makes restitution available regardless of whether the property was personally taken by the defendant or "los[t]" in some other way, so long as the defendant's offense "result[ed] in" the loss of the property. 18 U.S.C. 3663A(b)(1). The Court in *Robers* accordingly recognized that concepts of proximate causation are useful in determining the appropriate amount of restitution under Section 3663A(b)(1). See 134 S. Ct. at 1859 (noting that the statute "has a proximate cause requirement"). For reasons already discussed, see pp. 19-21, *supra*, those principles are amply satisfied here.

2. Petitioner argued at the certiorari stage that Section 3663A(b)(1) does not authorize restitution here because restitution is available only for the property that is "targeted in the offense." Pet. Reply Br. 7 (emphasis omitted). But Section 3663A(b)(1) requires restitution whenever the defendant's offense "result[s] in" loss of property, not just for specific "targeted" property. Petitioner's artificially narrow construction of "the property" would abandon time-tested concepts of proximate causation and frustrate the statutory object of "full restitution." *Dolan*, 560 U.S. at 612.

Petitioner further contended (Reply Br. 8) that Section 3663A(b)(1) cannot refer to any property losses that were incurred after the offense was complete. That contention lacks merit. Again, the statute requires restitution when the offense "*result[s] in* damage to or loss or destruction of" the property. 18 U.S.C. 3663A(b)(1) (emphasis added). If a defendant steals a precious vase from the victim, then drops and breaks it months later while preparing to sell it, the offense resulted in destruction of the property and the victim is entitled to restitution —including for any increase in value since the theft—

even though the destruction occurred after the offense (the theft) was completed. See 18 U.S.C. 3663A(b)(1)(B)(i). Reinforcing that commonsense interpretation, the statute recognizes that the defendant's "return of the property" might be "impossible." 18 U.S.C. 3663A(b)(1)(B).

3. Restitution is accordingly warranted in this case not only under Section 3663A(b)(4), but also Section 3663A(b)(1). The two provisions do not always overlap. Mileage fees for transportation to a proceeding in a personal vehicle, for example, might not constitute lost property and thus might be covered only by the former, and not the latter. But both subsections reflect Congress's broad intent to ensure "full restitution" in a case like this one. *Dolan*, 560 U.S. at 612.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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## APPENDIX

1. 18 U.S.C. 3663A provides:

**Mandatory restitution to victims of certain crimes**

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea spe-

cifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

2. 18 U.S.C. 3664 provides:

**Procedure for issuance and enforcement of order of restitution**

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances

exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such

order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the man-

ner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(*l*) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or

indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(*o*) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a

cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

3. 18 U.S.C. 3771 (2012 & Supp. IV 2016) provides:

**Crime victims' rights**

(a) RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

(b) RIGHTS AFFORDED.—

(1) IN GENERAL.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) HABEAS CORPUS PROCEEDINGS.—

(A) IN GENERAL.—In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) ENFORCEMENT.—

(i) IN GENERAL—These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) MULTIPLE VICTIMS.—In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) LIMITATION.—This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) DEFINITION.—For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) BEST EFFORTS TO ACCORD RIGHTS.—

(1) GOVERNMENT.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) ADVICE OF ATTORNEY.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) NOTICE.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) ENFORCEMENT AND LIMITATIONS.—

(1) RIGHTS.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) MULTIPLE CRIME VICTIMS.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipu-

lated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) ERROR.—In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) LIMITATION ON RELIEF.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) NO CAUSE OF ACTION.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its

officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) DEFINITIONS.—For the purposes of this chapter:

(1) COURT OF APPEALS.—The term "court of appeals" means—

(A) the United States court of appeals for the judicial district in which a defendant is being prosecuted; or

(B) for a prosecution in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals.

(2) CRIME VICTIM.—

(A) IN GENERAL.—The term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.

(B) MINORS AND CERTAIN OTHER VICTIMS.—In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(3) DISTRICT COURT; COURT.—The terms "district court" and "court" include the Superior Court of the District of Columbia.

(f) PROCEDURES TO PROMOTE COMPLIANCE.—

(1) REGULATIONS.—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) CONTENTS.—The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

No. 16-1519

# In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER


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## TABLE OF CONTENTS


Page

Argument ..... 1

A. Section 3663A(b)(4)'s plain text unambiguously excludes independent internal investigations and separate civil litigation ..... 2

B. Section 3663A(b)(4)'s statutory context and history confirm that restitution is unauthorized for these expenses ..... 18

C. The government's new argument under Section 3663a(b)(1) is improperly presented and meritless ..... 20

Conclusion ..... 22


## TABLE OF AUTHORITIES

Cases:


*Chaidez* v. *United States*, 568 U.S. 342 (2010) ..... 20

*CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642 (2016) ..... 21

*Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) ..... 12

*Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018) ..... 11

*Rowland* v. *Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194 (1993) ..... 7

*United States* v. *Amato*, 540 F.3d 153 (2d Cir. 2008) ..... 21

*United States* v. *Corey*, 77 Fed. App'x 7 (1st Cir. 2003) ..... 20

*United States* v. *Cuti*, 778 F.3d 83 (2d Cir. 2014) ..... 11

*United States* v. *Juvenile Female*, 296 F. App'x 547 (9th Cir. 2008) ..... 6, 11

*United States* v. *Mitchell*, 429 F.3d 952 (10th Cir. 2005) ..... 2

*United States* v. *Onyiego*, 286 F.3d 249 (5th Cir. 2002) ..... 22

Page

Cases—continued:

*United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011) ..... *passim*
*United States* v. *Simmonds*, 235 F.3d 826 (3d Cir. 2000) ..... 22
*United States* v. *Zander*, 794 F.3d 1220 (10th Cir. 2015) ..... 21

Statutes:

Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, § 204(a), 110 Stat. 1227 ..... *passim*
18 U.S.C. 3663A ..... *passim*
18 U.S.C. 3663A(a)(1) ..... 4, 6, 7
18 U.S.C. 3663A(a)(2) ..... 4, 8, 21
18 U.S.C. 3663A(b)(1) ..... 20, 21
18 U.S.C. 3663A(b)(4) ..... *passim*
Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248 ..... *passim*
18 U.S.C. 3663(b)(6) ..... 12, 19
18 U.S.C. 3664(f)(1)(A) ..... 1, 3
18 U.S.C. 3664(*l*) ..... 16
1 U.S.C. 1 ..... 7
18 U.S.C. 2248 ..... 2
18 U.S.C. 2259 ..... 2, 3, 7, 15

Miscellaneous:

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) ..... 14, 15, 17
S. Rep. No. 179, 104th Cong., 1st Sess. 18 (1995) ..... 3

## ARGUMENT

In examining Section 3663A(b)'s meaning, the government starts by looking everywhere *except* Section 3663A(b). It says to look to the so-called "ordinary" meaning of restitution, which appears nowhere in the statute. It says to look to the "statutory purpose," which is found in a Senate report, but not the statute. It says to look to the definition of "victim"—which, of course, defines eligible *victims* (under *subsection (a)*), but (critically) not the *types of restitution* victims may receive (under *subsection (b)*). And it says to look to 18 U.S.C. 3664(f)(1)(A), which is a *procedural* statute designed to enforce the *substantive* provisions found elsewhere; no one thinks Congress used Section 3664 to silently override the explicit limits on restitution found in Section 3663A(b)'s operative provisions.

The government wants to talk about everything but the text because the actual text forecloses its position. Section 3663A(b) does not provide for "full restitution," even though other statutes tellingly do. The operative section lists four detailed, specific categories of recovery that provide meaningful relief without inviting complex, fact-intensive disputes better suited to civil litigation. The government cannot satisfy multiple conditions in Section 3663A(b)(4)'s plain text, and it cannot explain the clear and obvious differences between this statute and other restitution provisions, where (unlike here) Congress *did* provide make-whole relief. GECC's investigation and litigation expenses fall outside the MVRA's scope, and they should have been excluded.

### A. Section 3663A(b)(4)'s Plain Text Unambiguously Excludes Independent Internal Investigations And Separate Civil Litigation

1. i. The government says that "[t]he ordinary definition of criminal 'restitution' is the restoration of the victim to the position that it occupied before the offense." Br. 13, 18. That "ordinary definition" might be relevant if Congress had *adopted* that definition in the statute. But whatever the "ordinary definition" might be, Congress instead enacted a very different scheme. It enumerated four specific, detailed categories of eligible recovery (18 U.S.C. 3663A(b)), and it did so against a backdrop where restitution is *not* authorized absent a positive statutory command (*United States* v. *Mitchell*, 429 F.3d 952, 961 (10th Cir. 2005)).

Congress *could* have replaced Section 3663A(b)'s detailed list with a simple directive that courts restore victims to their prior position—which, in fact, is closer to what Congress did in *other* restitution provisions (*e.g.*, 18 U.S.C. 2248; 18 U.S.C. 2259). Instead, however, Congress specified the precise expenses to include in the mandatory restitution order, and it thus necessarily excluded expenses falling outside those enumerated categories. Those categories, and not some general "definition," are controlling.

Indeed, the government admits elsewhere that Section 3663A(b)'s particular language controls. Br. 44. Yet the government does not explain what role that subsection plays if *all* losses are covered under the "ordinary" definition. As the D.C. Circuit explained, "[t]his is not a consequential damages statute. This text has a narrower focus." *United States* v. *Papagno*, 639 F.3d 1093, 1100 (D.C. Cir. 2011) (Kavanaugh, J.). The government may prefer a different, broader version that mirrors the so-

called "ordinary" definition, but it is not the one Congress provided.[1]

ii. According to the government, the MVRA's statutory purpose is "to provide 'full restitution to all identifiable victims of covered offenses.'" Br. 18 (quoting S. Rep. No. 179, 104th Cong., 1st Sess. 18 (1995)). But Congress did not use this general sense of "purpose" to supplant its explicit enumeration of four defined categories in the actual statute.

Congress does not pursue a statutory purpose at all costs, and the legislative purpose is ultimately reflected in the actual text. The quoted Senate Report was not voted on by Congress or signed by the President. The *enacted* provision reflects a specific, detailed list of covered expenses, even though Congress swept more broadly in other restitution provisions. It knew how to provide restitution for "full losses," but it adopted a narrowed scope here. If Congress wished to authorize "full restitution," it would have said so in the actual text—just as it did in multiple other provisions. *E.g.*, 18 U.S.C. 2259.

iii. The government repeatedly cites 18 U.S.C. 3664(f)(1)(A) for the proposition that Congress "explicit[ly]" provided for "full restitution" in the MVRA's text. Br. 29, 44. But Section 3664(f)(1)(A) contains a *procedural* directive, not a substantive one. See 18 U.S.C. 3664 ("Procedure for issuance and enforcement of order

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[1] Congress has implicitly confirmed that it does not share the government's understanding. As previously explained, Congress enacted legislation in 2016 requiring the GAO to study a possible *expansion* of the MVRA to "require that the defendant pay to the victim an amount determined by the court to restore the victim" to its prior position. Pet. Br. 5 (describing the Justice for All Reauthorization Act). Such a study was necessary because Congress understood the existing version to provide narrower relief.

of restitution"). It does not redefine the express categories and limitations in Section 3663A(b) or any other restitution provision. It simply directs that courts "shall order restitution to each victim in the full amount of each victim's losses *as determined by the court*," and courts make those determinations by employing the substantive statutes.

If Section 3663A(b) authorized "full restitution," the government would cite—*Section 3663A(b)*. Its repeated retreat to Section 3664 confirms its textual failings.

iv. In an extended discussion, the government argues that GECC was a "victim" because it was "'directly and proximately harmed'" by the offense. Br. 16-23 (quoting 18 U.S.C. 3663A(a)(1)). This discussion is largely irrelevant. Everyone agrees that GECC is a "victim" (18 U.S.C. 3663A(a)(2)), and that Congress defined the category of "victims" expansively. It wanted to ensure that more people affected by crime were eligible for restitution. But that says nothing about the *scope* of restitution available for those eligible victims. That question is answered by Section 3663A(b), not Section 3663A(a).

The government responds that Section 3663A(a)(2)'s definition of "victim" is relevant to construing Section 3663A(b), because statutory construction is "a holistic endeavor." Br. 21-22 (citation omitted). Certainly true, but here Congress used each part of the statute for a different function. It could not have spoken any more plainly in using language in subsection (a) to say *who* is a victim. And it could not have spoken any more plainly in subsection (b) to say *which expenses* are eligible. It is not reading a statute "holistically" to bulldoze the clear statutory structure, eliminate the clear differentiation between sections, and ignore the plain text to presume that Congress intended the definition in (a) to rewrite the specific categories in (b).

And the government further ignores the reason that Congress would have preferred a *broader* definition of "victim": again, it cast a wide net so that anyone who incurs *the type of expenses in subsection (b)* is actually eligible to recover those expenses. If Congress instead meant to simply authorize any expenses "directly and proximately" caused by the crime, it would have said that—full stop—without taking care to specify *permissible* restitution under the statute. And we know that Congress was fully aware how to do that because, again, *it did exactly that* in other restitution statutes. Congress's choice of a narrow provision here was presumptively deliberate.

Enforcing the clear delineation between subsections (a) and (b) is thus very much "compatible" (Gov't Br. 22) with the rest of the law. What is *incompatible* is attempting to conflate a broader standard with four detailed, narrow categories in order to sweep past the limits Congress textually inserted into the statute.

2. When the government finally turns to the actual statutory text, its reading fails on multiple levels. According to the government, GECC's "investigatory" expenses are covered because its efforts ultimately "helped the government" and "supported its prosecution." Br. 24-25. But even if GECC's private effort was *useful* to the investigation or prosecution, that does not establish that GECC's costs were incurred (i) "during" (ii) its "participation" (iii) in the government's "investigation," much less (iv) that it was "necessary" to that investigation. It merely shows what the government repeatedly says: the effort was possibly useful to the prosecution, which is not Section 3663A(b)(4)'s controlling standard. In any event, "[c]all it *ejusdem generis* or call it common sense" (NACDL Amicus Br. 3)—Section 3663A(b)(4)'s specific listed examples

are nothing like professional fees, and those fees accordingly fall outside the "other expenses" contemplated by the provision.

i. According to the government, "the investigation" can mean *any* investigation, so any private costs incurred participating in a private investigation are covered. Br. 26-29. This reading cannot be squared with the statute's plain text, and it would produce a series of absurd results.

a. Under a proper construction, "the investigation * * * *of the offense*" means the government's investigation, just as the "prosecution *of the offense*" means the government's prosecution. The entire focus is on "the offense," which is a criminal term. See 18 U.S.C. 3663A(a)(1) ("convicted of an offense"). The investigation is thus a criminal investigation. Private parties do not conduct criminal investigations; the government does.

And if Congress had in mind any private investigation, it would not have deliberately linked the terms "investigation" and "prosecution." Congress grouped those terms together, and introduced them as a unit ("*the* investigation or prosecution"). And it phrased those terms in the singular. It is accordingly "plain" that "'*the* investigation' for which restitution is available under § 3663A(b)(4) is the government's official investigation, not an entirely separate one engaged in by the victim's relatives." *United States* v. *Juvenile Female*, 296 F. App'x 547, 551 (9th Cir. 2008) (Berzon, J., dissenting).

b. The government responds that Congress could have said "the government's investigation" if that is what it meant. Br. 26. But this completely ignores the full text and context of the provision. Just as Congress did not have to say "the government's *prosecution*," it likewise did not have to say "the government's *investigation*." And that is especially true, again, when it is not simply any investiga-

tion, but an investigation *of the offense*. Only the government conducts criminal investigations, and Congress had no need to spell out what was obvious from context.

Had Congress wanted to capture private investigations, it would have said so directly. It would have included in the enumerated list at least *some* kinds of expenses the government says Congress had in mind. Yet there is no reference to auditors, lawyers, accountants, forensic experts, or any other actors commonly used in private investigations. Section 3663A(b)(4) is instead framed exclusively in terms of indirect, day-to-day, incidental expenses from traveling and meeting with the government to provide the kind of testimony and evidence most naturally described as *participating* in the official investigation.

Finally, the government ignores the broader statutory scheme. Congress did indeed include private investigations in *other* restitution provisions, but not this one. Those other sections cross-reference Section 3663A (*e.g.*, 18 U.S.C. 2259(a)), so this was not an accident of legislative drafting. Congress used different language in different provisions, and those differences *mean* something. *Papagno*, 639 F.3d at 1099-1100. The government has no sound answer for any of these points.

c. The government also argues that Section 3663A(b)(4)'s text does not "dictate that only one 'investigation' may occur." Br. 26 (citing 1 U.S.C. 1). But the Dictionary Act does not automatically apply simply because *some* singular words are sensibly read as capturing the plural; it requires courts to consider the surrounding words and context. *Rowland* v. *Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199-200 (1993).

Here, the entire focus is on providing restitution for "a defendant convicted of *an offense*." 18 U.S.C. 3663A(a)(1) (emphasis added). The restitution is accordingly linked to

*that* offense; the victim (harmed by that "offense," 18 U.S.C. 3663A(a)(2)) can seek reimbursement for participating in "the investigation or prosecution" of *that* "offense." 18 U.S.C. 3663A(b)(4). And the text says "*the* investigation," not any investigation, and that investigation, again, is of "*the* offense." The context is unmistakable: "the singular 'offense' referred to in § 3663A(b)(4) is of course the criminal offense of conviction," and "[t]he singular 'investigation or prosecution' of 'the offense' is therefore the criminal investigation and prosecution that is usually conducted by the FBI or other federal investigators and the local United States Attorney's office." *Papagno*, 639 F.3d at 1097-1098.

d. Finally, the government's theory would produce absurd results. If the government is right, a private party is entitled to restitution for its own investigation *even if it never discloses the results to anyone*. The statutory requirements can be met simply by showing an expense necessary *to that investigation* and incurred while "participating" in that investigation. There is no statutory hook to limit recovery to situations where the investigation has some use in the official prosecution.

Moreover, it would likewise make no difference whether the investigation arose before or after the government's investigation—or even after a final conviction. So long as the restitution request was submitted within the statutory deadline, the government's theory leaves no obvious basis for excluding the recovery.

While it is theoretically possible that Congress could craft such a scheme, there is no indication that it did so here. The more natural reading is to take the statute to mean what it says. The text says the investigation *of the offense*, which accordingly is the government's criminal investigation. Private investigations are not covered.

ii. The government argues that GECC "participated" in the investigation because its work supposedly "helped the government" and "supported the prosecution." Br. 24-25, 30.

This flouts the common understanding of that term. The government is correct that the term is "broad" (Br. 30), but it is not limitless. It does not include simple aiding and abetting, and it requires "taking part"—*participating*—in another's activity. Pet. Br. 20-21. A victim surely can *assist* the government's investigation by doing independent work. But a private party does not "participate" in the government's investigation by conducting its own inquiry entirely unbeknownst to the government. No one, for example, learns that a witness will "participate," and then expects the witness to walk off in the other direction to conduct an entirely separate investigation. One instead expects the witness to meet with the government and disclose what he or she knows.

Put simply: "If assisting the criminal investigation were alone enough to constitute 'participation' in the criminal investigation, as the Government argues, then even an internal investigation that *preceded* the criminal investigation could qualify as 'participation.'" *Papagno*, 639 F.3d at 1099; see Gov't Br. 30 (embracing this view). Yet it makes little sense to say one can "take part in" something that does not yet exist. *Ibid.* If Congress intended such an unusual result, one would expect clearer language than this.[2]

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[2] The government concedes that "participation" has "some limits," but says those limits "will depend on all the facts and circumstances." Br. 31. That is not an intelligible standard for administering these cases. This involves criminal sentencing. These proceedings rely on speed and certainty. A standard that turns on some vague (and unspecified) grouping of "all the facts and circumstances" is unworkable

iii. a. The government attacks petitioner's reading of the term "during," and says that expenses are covered even if they were incurred before the investigation began. Br. 31-32. Yet in offering a plain-text interpretation of "during," the government says—nothing. It says petitioner is somehow wrong, but the government never says what else the term could possibly mean. The concept plainly requires action while the investigation is ongoing; it excludes anything before or after. The government may dislike the language, but it cannot simply read it out of the statute.

b. Because the government has no answer for the plain text, it instead focuses on policy. According to the government, it would "make little sense" to preclude restitution for someone "proactive" in initiating a private investigation while providing restitution for someone "prodded" to participate. Br. 29.

The government is wrong on multiple levels. For one, Congress had sound reasons to limit expenses to those incurred "during" participation in the government's efforts. That requirement lets the government provide guidance and input on the subject and scope of the party's efforts. It ensures maximum cooperation and reduces the risk of unnecessary or excessive expenses. And it helps avoid actions that interfere with the government's work. *E.g.*, *Papagno*, 639 F.3d at 1100 n.5. A "proactive" investigation, by contrast, invites those costs and risks.

Moreover, the term "during" underscores the very point of the provision: Section 3663A(b)(4) targets the incidental costs of working with the government to advance

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for the "thousands" of sentencing proceedings where this issue arises (Gov't Br. 17). While the government says courts have not had "substantial difficulty" applying its (non)standard, not everyone agrees. Pet. App. 8a (Higginson, J., concurring) ("I do not envy district courts faced with this task.").

*its* work. It focuses on the kinds of costs that are incurred "during" participation with the government, because that is the sole participation that Congress had in mind for this provision. It thus makes perfect sense that Congress would mention the type of out-of-pocket costs (transportation and child care) to facilitate meeting with agents or testifying at hearings; those costs happen *during* the government's efforts. It is telling that nothing in the statute suggests Congress intended to cover a private investigation operating entirely apart from the government's work.

c. As petitioner explained (Br. 21-22), there is a "critical" difference in language between the MVRA and the VWPA—the former says "during," while the latter says "related to." The government brushes aside this difference, saying "different words used in different [provisions]" can still "mean roughly the same thing." Br. 32 (quoting *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 845 (2018)). The point, however, is not that disparate language *never* means the same thing, but that it presumptively does not mean the same thing. Here, Congress copied over the VWPA's text but conspicuously modified this key clause; the modification was presumably for a reason.

The government asserts that "[m]ultiple" circuits have "found no meaningful difference" between the two provisions. But the government ignores that the Second Circuit—a court on its side of the split—has acknowledged exactly the point petitioner makes here (*United States* v. *Cuti*, 778 F.3d 83, 96 n.5 (2d Cir. 2014)), and it likewise ignores Judge Berzon's dissent—which went effectively unanswered by the Ninth Circuit majority. *Juvenile Female*, 296 F. App'x at 551. And the remaining courts of appeals did not squarely acknowledge the issue or explain away the linguistic difference; these courts apparently overlooked it. This is why the government fails to cite a

single case, anywhere, grappling with the issue and explaining that Congress used markedly different terms here to accomplish exactly the same thing.[3]

In the end, the government is correct that a temporal limit might not capture the entire universe of restitution. Br. 29. But Congress deliberately used broader language in other restitution provisions, and it left certain gaps here. That is a decision for Congress, not the courts, and it is not the judiciary's role to rewrite Congress's work. *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017).

iv. a. As previously explained (Pet. Br. 23-24), Section 3663A(b)(4) covers only "necessary" expenses, and an expense is not "necessary" if nobody required or requested it. *Papagno*, 639 F.3d at 1100.

In response, the government argues that the term "necessary" only asks if the expense is "appropriate" or "reasonably useful." Br. 26, 33. But this does not explain why private investigations are "necessary" in this context: Was it necessary for GECC to conduct its own private inquiry when the government could have done the work on its own? And was it necessary when the government will inevitably examine that same evidence itself?[4]

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[3] The government further finds it odd that the MVRA might "allow[] *less* restitution" than the VWPA. Br. 32. But restitution under the MVRA is *mandatory*, and there was reason to temper the reach of (potentially unwieldy) provisions given that mandatory command. Further, the government overlooks other instances where the VWPA plainly sweeps broader than the MVRA. See, *e.g.*, 18 U.S.C. 3663(b)(6).

[4] Contrary to the government's contention (Br. 23), GECC's private investigation did not "enabl[e]" the government's prosecution. There is no indication that the government did not (or could not) do its own investigation. And, in fact, it would be rare for the government to simply take a private party at its word rather than take its own look at alleged misconduct.

This shows the dangers of letting a private party conduct its own investigation without government input or supervision. It is entirely possible (if not probable) that GECC, working at the government's direction, could have avoided most or all of these expenses. And there is no indication that Congress intended to include those significant costs as a *mandatory* part of a criminal sentence—especially by authorizing incidental, indirect expenses (child care and transportation) associated with "participating" in the government's investigation.

b. According to the government, the prosecutors "explained to the sentencing court" that "GE Capital's investigatory actions were 'ultimately vital to the later prosecution.'" Br. 24 (quoting J.A. 18); accord Gov't Br. 9, 13, 31. This is misleading. The prosecutors did not say that *all* of GECC's efforts were "vital"; they said only that *preserving the electronic data* was "vital." J.A. 18. That constituted less than $21,000 of a $4.895 million award. The prosecutors did not indicate the evidence would have otherwise been destroyed (indeed, petitioner confessed); and they did not suggest that federal agents could not have made the same copies on their own, avoiding the private expense.

This highlights precisely the problems and guesswork that the government's theory invites. As Judge Higginson explained (Pet. App. 7a-11a), it is difficult enough for courts to assess legal fees after observing an entire case; here, judges are asked to approve fees in a truncated proceeding where efficiency and speed make it nearly impossible to responsibly resolve complex, fact-intensive disputes.

There is every reason to think that Congress did not intend to invite those kinds of difficult inquiries in the "tens of thousands of [annual] sentencing proceedings"

under the MVRA (Gov't Br. 17); see also 18 U.S.C. 3663A(c)(3)(B).

v. Petitioner previously explained that professional fees fall outside Section 3663A(b)(4) under a straightforward application of ejusdem generis. Br. 24-26. In response, the government argues that ejusdem generis does not apply because "the statute's specific terms 'do not fit into any kind of definable category.'" Br. 40-41 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 209 (2012)). As the government sees it, there is no clear connection between "lost income," "child care," and "transportation" aside from the fact that all are "'expenses that one might conceivably incur while participating in an investigation or prosecution or attending proceedings.'" Br. 41.

But the government ignores the obvious connection: each term captures incidental, out-of-pocket expenses required to *enable* "participation." Each one reflects the indirect costs of skipping day-to-day activities to meet with agents or testify at trial. None, by contrast, involve the direct costs of a private investigation.

Nor was it "anomalous" for Congress to cover "'incidental' or 'minor' expenses while ignoring 'direct' or 'major' expenses." Gov't Br. 41. This simply confirms that Congress did not have private investigations (or their direct, major costs) in mind. And if Congress did have those expenses in mind, the true anomaly would be Congress's choice only to list incidental expenses without a single hint that anything else was included.

The government further argues that Congress listed the expenses it did because they "might otherwise be overlooked." Br. 14, 41-42. But even were that a concern, this is still not how Congress would have drafted the statute. Congress would have said victims can recover "nec-

essary expenses, *including* child care and transportation"; it would not have said, as it did here, that victims can recover "child care, transportation, *and other expenses*." And this is especially obvious given the contrast between Section 3663A(b) and other restitution provisions, where Congress indeed provided for *full restitution*, and then specifically noted that such restitution "includes" a specific list of costs.

The different phrasing is telling: Congress is well aware of principles of ejusdem generis, and it would have known that employing the critical formulation—specific expenses followed by a general catchall—invokes the canon. Scalia & Garner, *supra*, at 212 ("Any lawyer or legislative drafter who writes two or more specifics followed by a general residual term without the intention that the residual term be limited may be guilty of malpractice."). The government cannot explain why Congress would have adopted the opposite formulation in other restitution provisions but invoked the classic ejusdem generis formulation here.

Finally, the government argues that there was no need to list "[a]ttorney's fees and accounting costs" because those expenses were unlikely to be overlooked. Br. 42. Yet those fees *are* separately enumerated in other restitution statutes when Congress wanted to include them. *E.g.*, 18 U.S.C. 2259(b)(3)(E). The government again does not explain why Congress would have felt the same fees would be "obviously" covered under the MVRA but not covered under *broader* restitution provisions.[6]

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[6] Nor is it "deeply inequitable" (Gov't Br. 42) to leave professional fees uncovered. The fact that an expense is not included in restitution does not mean it is not reimbursable. It simply reflects Congress's determination that certain expenses are more appropriately pursued in traditional civil litigation. Pet. App. 11a. And Congress has reduced

3. According to the government, GECC "was forced to spend millions of dollars attempting to recover as much of its loan principal as possible in the bankruptcy proceedings," and those full costs "are recoverable in restitution" under the MVRA. Br. 36. The government is wrong.

i. The government's textual argument is indefensible. According to the government, the entirety of GECC's expenses qualify as "'expenses incurred during * * * attendance at proceedings related to the offense.'" Br. 37 (quoting 18 U.S.C. 3663A(b)(4)). But this provision covers the expense of *attending* certain proceedings; it does not cover all expenses *incurred during those proceedings*. "Attendance" is the key term, and its meaning is plain. It covers the expense of showing up, but there is no plausible interpretation that "attendance" also includes *the background work of litigating the case*. A victim may eventually "attend" a hearing on a motion, but no one rationally says that the cost of "attendance" includes the legal fees that went into the days or weeks of researching, drafting, and filing the underlying brief.

The surrounding text forecloses any lingering doubt. Section 3663A(b)(4)'s enumerated expenses—"child care" and "transportation"—contemplate *physical* attendance, not background work. One might have to catch a cab to a hearing, but no one thinks Congress had in mind catching a cab to the office to draft a motion for a hearing months away.

This alone establishes the error below. GECC's costs were not for "attending" the proceedings; they were for litigating the entire bankruptcy case. J.A. 26-29. There is

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the burden of that litigation by "estop[ping] the defendant from denying the essential allegations of th[e] offense" in subsequent civil proceedings. 18 U.S.C. 3664(*l*).

no textual basis of any kind for that recovery, and the government did not even attempt below to distinguish between the minimal costs of attendance versus the massive costs of consulting and providing legal advice for the case.[6]

ii. In any event, contrary to the government's contention (Br. 38-40), the sole "proceedings" related to the offense are *criminal* proceedings, not civil ones. Congress did not have to include the "modifier 'criminal'" (Br. 38), because the context already made it obvious. Pet. Br. 18-19. Indeed, the entire statutory context reinforces a uniform focus on criminal proceedings. And where each clause plainly involves a criminal action, the remaining clause is read to assume the same characteristics. Scalia & Garner, *supra*, at 196 (describing noscitur a sociis); Pet. App. 7a (Higginson, J., concurring).[7]

Moreover, it makes little sense to presume that Congress wished to reimburse victims for "attendance" at their own civil proceedings, but not the full underlying expense of the case. If Congress felt that the costs of private litigation should be included, there is no plausible explanation for why it would have drawn the line at attendance, as opposed to professional fees or (say) filing costs. The alternative explanation is obvious: When the government conducts a criminal hearing, *it assumes all other costs.*

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[6] Nor does it matter that GECC "appear[ed] in the bankruptcy proceedings 'to protect its rights and preserve its collateral.'" Br. 38 (quoting J.A. 27). The same is true of any victim filing a civil action to seek damages or relief. Yet no one seriously maintains that all parallel civil litigation is covered under Section 3663A(b).

[7] And the plural ("proceedings") is easily explained: Congress knew that criminal prosecutions proceed in phases, including multiple separate proceedings (grand-jury hearings, initial appearances, bond hearings, jury selection, the trial, post-trial sentencing, etc.). Read in context, this is the only plausible interpretation of that phrase.

The only remaining costs involve the incidental expenses of getting a witness to court to attend or testify in person. That participatory role is necessary to the government's efforts, and it is the only role contemplated by Section 3663A(b)(4).[8]

**B. Section 3663A(b)(4)'s Statutory Context And History Confirm That Restitution Is Unauthorized For These Expenses**

1. As previously explained, Congress enacted the MVRA against a backdrop of other statutes that expressly provide the "full restitution" the government says was intended here. Yet rather than repeat the same broad formulations found in those sections, Congress instead drafted Section 3663A(b)(4) with a list of four, specific, detailed categories. The government has no real answer for this obvious problem with its argument: Congress drafted both broad and narrow restitution statutes, and it plainly drafted a narrower version here.

The government barely acknowledges the import of those other statutes. It says that "Congress's offense-specific restitution statutes have a distinct structure: they require restitution for 'the full amount of the victim's losses'

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[8] The government suggests GECC's bankruptcy expenses should be covered because its efforts in those proceedings "significantly *reduced* the amount of principal that petitioner would otherwise have owed as restitution." Br. 36 (arguing that GECC's efforts should not leave it "in a worse position"). This is puzzling: GECC is most assuredly *better* off for having litigated to recover assets in Dry Van's bankruptcy. The only reason the restitution amount is lower is *because GECC actually recouped losses (approximately $15 million) it was otherwise owed.* J.A. 48, 70. Had it not participated, it would have saved some professional fees, but it would also have been left with a higher unpaid balance (assuming other creditors claimed the assets in the bankruptcy case). A party who recovers in civil litigation may be entitled to less restitution, but it is generally accepted that ordinary litigation expenses are not covered by the MVRA.

and then define that term to 'include[ ]' particular costs, including 'attorney's fees, as well as other costs incurred,' and 'any other losses suffered by the victim as a proximate result of the offense.'" Br. 42-43. This is exactly *petitioner's* point: Congress could have authorized the same sweeping restitution here, but instead limited the MVRA to four specific, detailed categories. Unlike those other provisions, Section 3663A(b) does not approach make-whole relief.

This Court has repeatedly emphasized that Congress's use of different terms in different sections suggests Congress intended a different result. It crafted broad statutes elsewhere, and those statutes cross-reference the MVRA by name—to say the broader provisions apply *notwithstanding* the MVRA. Section 3663A(b)'s plain text should not be distorted to mirror the extensive restitution that Congress authorized in other sections, but not here.

2. The government argues that the 2008 amendment to the VWPA—adding Section 3663(b)(6)—does not suggest that private investigation expenses fall outside Section 3663A(b)(4). According to the government, "Section 3663(b)(6) does not refer to internal investigations at all, but instead to the 'time value' of remediation efforts by identity-theft victims." Br. 34-35. This misses the point. The idea is that, under the government's theory, those "remediation" expenses would *already* be covered under Section 3663(b)(4) or (b)(1). Congress instead elected to expand the remedy for identify-theft victims without creating any corresponding coverage under the MVRA. As

*Papagno* explained, that decision was presumptively deliberate.[9]

### C. The Government's New Argument Under Section 3663A(b)(1) Is Improperly Presented And Meritless

As an alternative ground for affirmance, the government argues, for the first time in this litigation, that Section 3663A(b)*(1)* independently covers GECC's expenses by mandating restitution for all proximately caused losses. This new contention is not properly before the Court, and it is otherwise meritless.

1. The government's new Section 3663A(b)(1) argument is not properly presented. The Court generally refuses to consider "questions neither raised nor resolved below." *Glover* v. *United States*, 531 U.S. 198, 205 (2001). And it has consistently reminded litigants that it is "'a court of review, not of first view.'" *Chaidez* v. *United States*, 568 U.S. 342, 357 n.16 (2010).

Below, the government supported restitution with paragraph (b)(4), not (b)(1). See J.A. 17, C.A. Gov't Br. 12; cf. Br. 46. The Court's usual caution against addressing new issues is particularly warranted here, where even the government's own authority explains that paragraph (b)(1) requires a "fact-specific," "individualized inquiry." *United States* v. *Corey*, 77 Fed. App'x 7, 10 (1st Cir. 2003)

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[9] According to the government, attorney's fees are covered despite the lack of a clear statement because "this Court has never held that such a clear-statement rule applies to Congress's criminal restitution statutes." Br. 44 n.7. But if the targeted fees were spent in a civil case, there is every reason to believe the same fee-shifting rules would apply. Indeed, if anything, one would presume an especially strong need for a clear-statement rule given the setting—a statute authorizing *criminal punishment*. Aside from baldly asserting that the American Rule is inapplicable, the government does not explain why the Court should permit fee-shifting without explicit legislative direction.

(emphasis removed); see, *e.g.*, *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1653-1654 (2016). Although the district court necessarily found that GECC was proximately harmed (18 U.S.C. 3663A(a)(2)), it did not consider whether petitioner's offense proximately caused GECC's expenses. This Court should not address that question in the first instance.

2. Regardless, the government's interpretation of Section 3663A(b)(1) is wrong. That section provides that, where the "offense result[ed] in damage to or loss or destruction of property of a victim of the offense," the defendant must "return the property." 18 U.S.C. 3663A(b)(1)(A). If return is "impossible, impracticable, or inadequate," the defendant must repay the property's value. 18 U.S.C. 3663A(b)(1)(B). The obvious import of these provisions is that a property crime entails the defendant taking (or damaging) property, so he must "return" it (subparagraph (A)) or restore its value (subparagraph (B)). The focus is on the property that was the subject of the illegal conduct. In a theft, the "lost" property is what was stolen (*e.g.*, the vase), not the expenses incurred to investigate whether anything else was taken and how the culprit bypassed security. Accordingly, paragraph (b)(1) orders the vase returned, not the investigatory expenses. The theft did not cause those latter expenses any more than a botched surgery causes a malpractice suit, even though that suit is "foreseeable." But Section 3663A(b)(1) does not contemplate all expenses that may have been "caused, in some Palsgrafian sense," by the theft. *Papagno*, 639 F.3d at 1100.

Had Congress wanted to include all losses proximately caused by the offense, it knew how to do so. It instead wrote a far more limited provision. See, *e.g.*, *United States* v. *Zander*, 794 F.3d 1220, 1233 (10th Cir. 2015); *United States* v. *Amato*, 540 F.3d 153, 161 (2d Cir. 2008); *United*

*States* v. *Onyiego*, 286 F.3d 249, 256 (5th Cir. 2002); *United States* v. *Simmonds*, 235 F.3d 826, 834 (3d Cir. 2000).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 2018

No. 16-1519

# In the Supreme Court of the United States

SERGIO FERNANDO LAGOS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

## BRIEF FOR PROFESSOR SHON HOPWOOD AS AMICUS CURIAE IN SUPPORT OF PETITIONER


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## TABLE OF CONTENTS

Page

Interest of Amicus Curiae ..... 1

Summary of Argument ..... 1

Argument ..... 3

I. Massive restitution awards, including awards for expensive internal investigations, impede rehabilitation and make defendants more likely to commit new crimes. ..... 3

A. Unaffordable restitution awards thwart rehabilitation. ..... 4

B. These concerns affect white-collar defendants as well. ..... 11

C. Independent internal investigations are especially likely to produce massive, unaffordable restitution awards. ..... 14

II. Unaffordable restitution awards harm victims, waste money, and diminish respect for the courts ..... 16

Conclusion ..... 19

## TABLE OF AUTHORITIES

Page

**Cases**

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461 U.S. 660 (1983) ..... 8

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861 F. Supp. 2d 716 (E.D. Va. 2012) ..... 13

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888 A.2d 204 (Del. 2005) ..... 13

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137 S. Ct. 1626 (2017) ..... 13

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720 F.3d 453 (2d Cir. 2013) ..... 13

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708 F. App'x 21 (2d Cir. 2017) ..... 13

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107 F.3d 1515 (11th Cir. 1997) ..... 10

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857 F.3d 1060 (9th Cir. 2017) ..... 18

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532 F.3d 811 (8th Cir. 2008) ..... 9

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639 F.3d 1093 (D.C. Cir. 2011) ..... 14

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No. CR08-0072, 2012 WL 3151564
(N.D. Iowa Aug. 2, 2012) ..... 9

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268 F.3d 346 (6th Cir. 2001) ..... 10

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7 U.S.C. 2015(k) ..... 7

**TABLE OF AUTHORITIES—continued**

Page

11 U.S.C. 523(a) ..... 6
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18 U.S.C. 3613A ..... 8
18 U.S.C. 3614(b) ..... 8
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18 U.S.C. 3664(a) ..... 18
18 U.S.C. 3664(d) ..... 18
18 U.S.C. 3664(e) ..... 10, 18
18 U.S.C. 3664(f) ..... 4, 10
28 U.S.C. 3102–3104 ..... 6
28 U.S.C. 3201 ..... 6
28 U.S.C. 3205 ..... 6
42 U.S.C. 608(a) ..... 7
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Page

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**TABLE OF AUTHORITIES—continued**

Page

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Lauren-Brooke Eisen, Brennan Ctr. for Justice, *Charging Inmates Perpetuates Mass Incarceration* (2015), https://perma.cc/725J-6T7B ..... 7

Dallan F. Flake, *When Any Sentence is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 Wash. U. L. Rev. 45 (2015) ..... 5

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Page

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Page

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## BRIEF FOR PROFESSOR SHON HOPWOOD AS AMICUS CURIAE IN SUPPORT OF PETITIONER

### INTEREST OF AMICUS CURIAE

Shon Hopwood is an Associate Professor of Law at Georgetown University Law Center and the author of *Law Man: My Story of Robbing Banks, Winning Supreme Court Cases and Finding Redemption.*[1] Before attending law school, receiving a law license, serving as a judicial law clerk, and joining the legal academy, Professor Hopwood pleaded guilty to bank robberies and the use of a firearm during those robberies, and served nearly eleven years in federal prison.

Now, he studies and teaches criminal law, criminal procedure, and prisoner-rights law. Drawing on both his experience and his research, Professor Hopwood is also a prominent advocate of criminal-justice reform, including improvements to sentencing processes and outcomes.

This case directly implicates Professor Hopwood's interest in ensuring that criminal sentences do not undermine the justice system's objectives, including rehabilitating defendants and treating victims fairly.

### SUMMARY OF ARGUMENT

Restitution awards for multimillion-dollar internal investigations neither requested nor required by the Government would create massive new criminal debt, thwarting rehabilitation and frustrating victims. Applying the Mandatory Victims Restitution Act (MVRA), 18 U.S.C.

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[1] As required by Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

3663A, to permit this result would not only flout the statute's text, it would quite literally prevent most defendants from paying their debts to society.

First, restitution awards exceeding a defendant's ability to pay impede rehabilitation. "From seeking and maintaining employment and housing, to obtaining public benefits, to meeting financial obligations such as child support, to exercising the right to vote, criminal justice debt is a barrier to individuals seeking to rebuild their lives after a criminal conviction." Alicia Bannon et al., Brennan Ctr. for Justice, *Criminal Justice Debt: A Barrier to Reentry* 27 (2010), https://perma.cc/97PT-4BPP. Yet because the MVRA requires courts to impose restitution even if the defendant cannot afford to pay it, allowing restitution for expensive, independent investigations would likely push defendants' debts past the breaking point. And defendants who are unable to pay their restitution debts face the prospect of violating the terms of their release and hence returning to prison.

Massive restitution awards are likely to be beyond the means of most white-collar defendants, too. The legal fees, costs, fines, and other expenses that accompany a white-collar defense and conviction leave even previously wealthy defendants with little money left. Some defendants can afford to pay a victim's medical bills or the wages lost from testifying in court; few can afford to pay the hourly fees of a large corporation's fleet of outside lawyers and consultants to investigate financial transactions for months if not years.

Second, these obstacles to rehabilitation and increased risk of recidivism would yield little benefit to victims, the justice system, or the public at large. As reflected by the staggering amount of federal restitution debt that is neither collected nor collectible, the MVRA would not efficiently or effectively compensate victims for multimillion-

dollar expenses like internal investigations. Large, unpaid awards also frustrate victims, who are more likely to be satisfied by smaller awards that defendants can actually afford to pay, and who lose respect for the courts when massive restitution awards are imposed but not collectable. Victims who wish to pursue compensation for big-ticket items like independent investigations can do so through the civil process, where victims—not the Government—control the pursuit and can determine whether pursuing a larger award is worthwhile given the defendant's ability or inability to pay.

In sum, imposing millions of additional dollars in restitution debt for internal investigations is likely to harm defendants, plunging them further into debt, preventing them from rejoining society, and making them more likely to commit new crimes. At the same time, restitution awards that are large yet uncollectable frustrate victims, who feel let down by the courts and who would be more satisfied with awards that are smaller yet collectible. And if Congress had nonetheless wanted the MVRA to harm both defendants and victims in this manner, it would have been clearer.

## ARGUMENT

### I. Massive restitution awards, including awards for expensive internal investigations, impede rehabilitation and make defendants more likely to commit new crimes.

Restitution awards often make it harder for defendants to rejoin society and leave them more likely to commit new crimes. Accordingly, expanding the MVRA to require restitution for multimillion-dollar internal investigations—investigations conducted outside the Government's criminal process—would inevitably thwart defendants' rehabilitation.

### A. Unaffordable restitution awards thwart rehabilitation.

Although in certain circumstances, restitution orders can help to rehabilitate defendants, any such benefit is "lost when the restitution order exceeds the offender's financial means." Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Cal. L. Rev. 1687, 1704 (2009). When an award is beyond a defendant's ability to pay, it "becomes an obstacle to [the] defendant's rehabilitation." William M. Acker, Jr., *Making Sense of Victim Restitution: A Critical Perspective*, 6 Fed. Sent'g Rep. 234, 235 (1994). Yet because the MVRA requires courts to impose restitution whether or not the defendant can afford to pay it, 18 U.S.C. 3664(f)(1)(A), allowing restitution for expensive, independent investigations is likely to indebt defendants in a way that is substantial and unmanageable.

To begin, large restitution awards make it harder for defendants to find jobs, housing, transportation, and to otherwise become productive members of society. These tasks are difficult enough for those with criminal convictions; massive restitution debts make things more difficult still.

When a person has been convicted of a felony, he already faces punishment and struggle long after he has served his sentence and been released from custody. Experiencing what scholars call "civil death," a person emerging from custody as a convicted felon suffers from thousands of collateral consequences that "largely put that person outside the law's protection." Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1790 (2012). These collateral consequences include legal discrimination in employment, housing, education, and federal and

state benefits, in addition to potential disenfranchisement, loss of parental rights, ineligibility for student financial aid, revocation of professional and occupational licenses, and a host of other civil impairments. See, *e.g.*, Joy Radice, *The Reintegrative State*, 66 Emory L.J. 1315, 1330–1337 (2017); Chin, *supra*, at 1800–1801.

Given the collateral consequences and stigma faced by those previously convicted of crimes, "employment opportunities for ex-offenders are bleak." Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 Minn. L. Rev. 1837, 1850 (2014). Very bleak: Up to 60 percent of former prisoners are unemployed one year after they are released from prison. See Alicia Bannon et al., Brennan Ctr. for Justice, *Criminal Justice Debt: A Barrier to Reentry* 4 (2010), https://perma.cc/97PT-4BPP; see also Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 Wash. U. L. Rev. 45, 59–60 (2015) (collecting statistics). Those who do find jobs earn less money than those without criminal records. For example, a previously incarcerated white male makes an average annual salary of just over $12,000; that number is even lower for ex-offenders who are African-American or Hispanic. See Eaglin, *supra*, at 1851. People with criminal records also struggle to meet basic needs like stable housing. See, *e.g.*, Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457, 491–492 (2010); Bannon, *supra*, at 4.

For people confronting these challenges, massive restitution debt makes things even worse. A restitution order under the MVRA serves as a twenty-year "lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal

Revenue Code." 18 U.S.C. 3613(c). The Government may also file a writ of attachment on the defendant's property and a writ of garnishment on property and earnings. See 28 U.S.C. 3102–3104, 3205. Like a civil judgment, the federal restitution judgment also creates a lien on the defendant's real property. See 28 U.S.C. 3201. Thus, even if a defendant has the benefit of a realistic and manageable payment plan, the full judgment is likely to appear on the defendant's credit history.

Once a large restitution debt appears on a credit report, it often means "the denial of credit, housing, and employment opportunities." Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 Md. L. Rev. 486, 519 (2016). Employers, for instance, "increasingly use credit reports in their hiring decisions," Leah A. Plunkett, *Captive Markets*, 65 Hastings L.J. 57, 85 (2013), and are wary of hiring employees with significant debt, Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Soc. 1753, 1782 (2010). Poor credit makes it harder to rent an apartment, let alone finance a house, see Bannon, *supra*, at 27; those with criminal debt often struggle even to open a bank account, Harris, *supra*, at 1763. And defendants who hit rock bottom may not discharge federal restitution debts in bankruptcy. See, *e.g.*, 11 U.S.C. 523(a)(13) (discharge in Chapter 7 unavailable "for any payment of an order of restitution issued under title 18, United States Code").

In total, criminal-justice debt from unaffordable restitution awards leaves defendants "less able to meet other pressing needs, such as paying for rent, medicine, and food, or to financially support their children." Harris, *supra*, at 1778. In the face of these "difficult decisions about which bills to pay and which needs to meet in the face of a

financial shortfall each month," *id.* at 1778–1779, many defendants "rob Peter to pay Paul," *id.* at 1789 (quoting defendant).

For defendants unable to make scheduled restitution payments, things may get worse yet. If a missed restitution payment causes a defendant to violate probation or parole, she becomes ineligible for basic safety-net programs—including Temporary Assistance to Needy Families (TANF), the Supplemental Nutrition Assistance Program (SNAP), public housing, low-income housing assistance, and Supplemental Security Income (SSI) for the elderly and disabled. See 42 U.S.C. 608(a)(9)(A) (state may not use TANF grants to provide benefits to anyone "violating a condition of probation or parole imposed under Federal or State law"); 7 U.S.C. 2015(k)(1) (same for SNAP); 42 U.S.C. 1437d(*l*)(9) (same for public housing); 42 U.S.C. 1437f(d)(1)(B)(v) (same for low-income housing assistance); 42 U.S.C. 1382(e)(4)(A) (same for SSI).

These issues also affect defendants' family and friends, and may even dissuade defendants from getting married. For one, "[c]ollectors may seek recovery from jointly held assets and may even be able to garnish the earnings of a defendant's spouse." Sobol, *supra*, at 520. Even if their assets are not seized forcibly, "families and friends often provide the financial resources to prevent re-incarceration." *Ibid.* More generally, paying high monthly restitution bills can prevent defendants from supporting their families. See Lauren-Brooke Eisen, Brennan Ctr. for Justice, *Charging Inmates Perpetuates Mass Incarceration* 2 (2015), https://perma.cc/725J-6T7B ("Often, former inmates must depend on family members to pay the bills or are forced to prioritize criminal justice debt over other pressing needs such as feeding, clothing,

and housing family members who are reliant on their income.").

Bad enough on their own, the resulting poverty and joblessness also make former offenders more likely to commit more crimes. The economic literature reflects that "unemployment increases crime." Richard H. McAdams, *Economic Costs of Inequality*, 2010 U. Chi. Legal F. 23, 26 n.12 (2010) (collecting sources). That, in turn, means new victims and yet more economic and social costs—borne by victims, defendants, their families, and taxpayers.

Even in the short run, defendants unable to pay massive restitution awards get stuck in the criminal-justice system, visiting court more often and facing the possibility of revoked probation and additional incarceration. See, *e.g.*, Harris, *supra*, at 1782–1784. A defendant's supervised release may be revoked if the court finds that "the defendant is in default on a payment of a fine or restitution," 18 U.S.C. 3613A(a)(1), and the defendant may be incarcerated if a court finds that he failed to pay "willfully," 18 U.S.C. 3614(b)(1). See generally *Bearden* v. *Georgia*, 461 U.S. 660, 668 (1983) (state may imprison probationer who has "willfully refused to pay the fine or restitution when he has the means to pay").

But when deciding whether a defendant's failure to pay restitution is "willful," "most courts employ a very loose interpretation of the 'willfulness' requirement." Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 128 (2014). In one case, a defendant's supervised release was revoked, based on a "willful" failure to pay restitution, despite testimony from her counselor that she was mentally ill and likely unemployable; the court of appeals upheld the order returning her to prison despite "her repeated attempts to obtain employment,

including self-referral to Missouri's Vocational Rehabilitation Service, and the impact her mental illnesses and physical problems have on her ability to find and keep a job." *United States* v. *Montgomery*, 532 F.3d 811, 813, 814 (8th Cir. 2008). In another case, the court held that a prisoner's failure to make quarterly restitution payments was willful—even though he had only 67 cents in his prison account—because he had twice received $50 from his family over the course of five to six months and had used those funds to buy hygiene supplies. See *United States* v. *Rogers*, No. CR08-0072, 2012 WL 3151564, at *1, *3 (N.D. Iowa Aug. 2, 2012) (magistrate report & recommendation), *adopted* 2012 WL 3689477 (N.D. Iowa Aug. 27, 2012).[2] In practice, then, the willfulness requirement does not always protect defendants from returning to prison if they cannot afford to pay.

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[2] Studies of state and local courts reveal similar disregard for a defendant's actual ability to pay. Some judges have deemed nonpayment to be "willful" based solely on the defendants' physical appearance—such as "expensive-looking clothing or tattoos" or "manicured nails"—without any information about the defendants' income. See Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 Yale L. & Pol'y Rev. 93, 102 (2015). Another judge "simply asked everyone if they smoked" and then deemed smokers' nonpayment to be willful and imprisoned them on that basis alone. Bannon, *supra*, at 21. Some local governments arrest first and then ask questions later. See *id.* at 23 ("In some jurisdictions, a missed payment automatically triggers an arrest warrant, while in others, clerks or probations officers regularly seek arrest warrants when individuals fall behind on payments.") (footnotes omitted). And a defendant with no money was jailed for nonpayment of a criminal debt based on unfounded speculation that "someone in [the defendant's] family should be able to make a payment." Am. Civ. Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* 19 (2010), https://perma.cc/FR55-H6AX. These examples are far from isolated. See, *e.g.*, *id.* at 32–33, 44–48, 57–58, 65–67.

These added bouts of incarceration then undermine rehabilitation even further. For "[e]ven a short stint in jail can lead to harmful consequences such as job loss, family disruptions, and interruptions in treatment for addiction, all of which create a situation ripe for new and more serious offenses." Bannon, *supra*, at 19.

Nor do payment schedules, authorized by 18 U.S.C. 3664(f)(2), protect defendants from unaffordable restitution judgments and resulting criminal punishment. Calculating a payment schedule is necessarily imprecise, and courts must measure not only the defendant's financial obligations and assets (including assets shared with others), but also the indeterminate "projected earnings and other income of the defendant." *Ibid.* In some (but not all) circuits, a trial judge may even delegate the payment schedule to a probation officer. See *Weinberger* v. *United States*, 268 F.3d 346, 359–60 (6th Cir. 2001) (upholding district judge's decision to "delegat[e] the schedule of payments to the Probation Office"); *United States* v. *Fuentes*, 107 F.3d 1515, 1528 n.25 (11th Cir. 1997) (same); see also Anders Sleight, Comment, *Probation Officers' Authority to Determine Conditions of Supervised Release and Restitution Payment: Fair or Foul?*, 22 Geo. Mason U. Civ. Rts. L.J. 117, 136–139 (2011) (describing circuit split). And throughout this process, the defendant bears "[t]he burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents." 18 U.S.C. 3664(e).

The result is a vicious cycle: Poverty leads to restitution debt, which leads to more criminal consequences, which lead to yet more poverty, which leads to yet more restitution debt, which leads to yet more criminal consequences.

It is no wonder that the "threat of incarceration for unpaid [legal financial obligations] may even encourage individuals to commit crimes to obtain funds to avoid incarceration." Sobol, *supra*, at 493. In a recent study in Alabama, for instance, 17 percent of participants admitted to committing crimes to raise money to pay criminal punishments. See Foster Cook, *The Burden of Criminal Justice Debt in Alabama: 2014 Participant Self-Report Survey* 11–12 (2014), https://perma.cc/Z8MD-L9L4. One defendant even "engineered a massive mail fraud scheme in order to pay a restitution order and thereby avoid a revocation of probation proceeding." Lorraine Slavin & David J. Sorin, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 Fordham L. Rev. 507, 571 n.390 (1984) (citing statement by federal judge William T. Hodges).

However they address their restitution obligations, defendants "remain tethered to the criminal justice system—sometimes decades after they complete their sentences—and live under constant threat of being sent back to jail or prison, solely because they cannot pay what has become an unmanageable legal debt." Am. Civ. Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* 6 (2010), https://perma.cc/FR55-H6AX. Adding debt for costly internal investigations would aggravate these harms.

### B. These concerns affect white-collar defendants as well.

Although most criminal defendants are poor, the consequences of large restitution awards—and the resulting barriers to rehabilitation—affect even white-collar defendants who had financial resources before they entered the criminal-justice system. Defendants who started out

with assets often lose them because of prosecution and conviction.

Unless they are indigent, criminal defendants pay for their lawyers. And because prosecutions for federal financial crimes typically are long, complex, and heavy on documents, defending them is expensive. See, *e.g.*, *United States* v. *Stein*, 435 F. Supp. 2d 330, 362 (S.D.N.Y. 2006) (tax-fraud case involved "at least 5 million to 6 million pages of documents *plus* transcripts of 335 depositions and 195 income tax returns"; "briefs on pretrial motions passed the 1,000-page mark some time ago"; and "[t]he government expects its case in chief to last three months") (emphasis in original). Under these circumstances, even the most experienced and efficient criminal lawyer cannot do her job "without spending a great deal of time, which translates into a great deal of money, sorting out the legal, factual, and intent issues." Sarah Ribstein, Note, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 Duke L.J. 857, 866 (2009).

Accordingly, a white-collar criminal defense may well cost over a million dollars. See, *e.g.*, *Stein*, 435 F. Supp. 2d at 362 n.163 ("It therefore is quite reasonable to assume that even a minimal defense of this [tax-fraud] case could well cost $500,000 to $1 million, if not significantly more."). Defenses in some cases have cost as much as $30 or $40 million. See, *e.g.*, Sara Kropf, *How to Pay for a White Collar Criminal Defense Lawyer—Part II*, Grand Jury Target: Tracking Federal Prosecutions of Corporate Executives (July 10, 2015), https://perma.cc/3N7X-XY6Z.

In practice, most corporate directors and officers cannot afford their criminal defenses unless indemnified by their employers. See Ribstein, *supra*, at 873; see also, *e.g.*, Paul Davies & David Reilly, *In KPMG Case, the Thorny Issue of Legal Fees*, Wall St. J. (June 12, 2007), (KPMG

executive prosecuted for financial fraud "sold his house" after employer stopped paying his legal fees). But defense fees typically are reimbursed only if the defense succeeds. See, *e.g.*, *Homestore, Inc.* v. *Tafeen*, 888 A.2d 204, 211 (Del. 2005) (citing Del. Code Ann. tit. 8, § 145(c)). For the same reason, defendants whose legal fees and costs were advanced typically must repay them if they are convicted. See, *e.g.*, *Farkas* v. *Nat'l Union Fire Ins. Co. of Pittsburgh*, 861 F. Supp. 2d 716, 720–722 (E.D. Va. 2012) (upon fraud conviction, former company chairman required to pay full $2.035 million in legal fees for criminal defense, including $928,977.59 advanced to him by insurer), *aff'd* 518 F. App'x 178 (4th Cir. 2013).

In most cases, then, a defendant facing restitution—that is, a defendant who has been convicted—will bear the cost of the criminal defense, no matter how expensive.

Even if a white-collar defendant has money left after paying his criminal lawyers, he likely will pay other major costs. There are forfeiture statutes, empowering "the Government to confiscate property derived from or used to facilitate criminal activity." *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1631 (2017); see also, *e.g.*, 18 U.S.C. 981(a)(1) (Government may seize assets "involved in," "derived from," or "traceable to" the crime). There are criminal fines, which may be imposed atop restitution awards. See, *e.g.*, *United States* v. *Cuti*, 720 F.3d 453, 455 n.1 (2d Cir. 2013) (defendant convicted of securities fraud was fined $5 million); *United States* v. *Cuti*, 708 F. App'x 21, 22, 25 (2d Cir. 2017) (upholding most of $6.25 million restitution judgment against same defendant). And there are civil suits arising from the same conduct: Here, GECC sued Lagos and a co-conspirator; the suit settled for over $33.5 million, plus interest, see J.A. 44–45; and to date,

Lagos has been able to pay only a fraction of that judgment, financed primarily by the sale of his home, *ibid.*

Needless to say, a white-collar defendant "may not have the resources to repay the company." Peter J. Henning, *The Mounting Costs of Internal Investigations*, N.Y. Times (Mar. 5, 2012), https://perma.cc/D43V-GQ4D. And in those circumstances, the pressure of massive yet unpayable restitution awards—and the accompanying obstacles to rehabilitation—is just as real.

### C. Independent internal investigations are especially likely to produce massive, unaffordable restitution awards.

Expanding the MVRA to require restitution for massive internal investigations, including internal investigations neither requested nor required by the Government, would increase these problems dramatically. Compared to the items enumerated in the MVRA—"lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense," 18 U.S.C. 3663A(b)(4)—internal investigations cost far more. Companies can and often do spend hundreds of thousands or even millions of dollars on them. See Pet. Br. 26 (collecting examples). Here, in fact, the court ordered petitioner to pay over $4 million for GECC's internal investigation. See Pet. Br. 11.

Private investigations performed independently of the Government risk becoming especially sprawling and expensive. See, *e.g.*, *United States* v. *Papagano*, 639 F.3d 1093, 1095 (D.C. Cir. 2011) (after recovering nearly all of the stolen property, "the Laboratory then spent an additional $159,183.15 on an elaborate 3,500-hour internal investigation regarding property that was worth as little as

$120,000"). In 2015, the Assistant Attorney General for the Criminal Division explained that the Department of Justice places "a premium on targeted investigations." Eugene Illovsky, Morrison & Foerster LLP, *DOJ Provides "Best Practices" for Corporate Internal Investigations*, Harvard Law School Forum on Corporate Governance and Financial Regulation (June 28, 2015), https://perma.cc/4SYF-SQX7. Left to their own devices, however, companies are more likely to incur needless costs. As explained by the same Assistant Attorney General, "I've seen over the years, [a lot] of companies that did way too broad of an investigation and in my experience that was not the result of what DOJ told them to do." Mike Koehler, *Must See Video Clips from Assistant AG Caldwell's Recent FCPA Speech*, FCPA Professor (Nov. 7, 2016), https://perma.cc/A4QM-CAYM.

On the other hand, targeted investigations conducted at the Government's behest are more likely to be focused. Among other things, discussions with prosecutors can narrow seemingly broad subpoenas to more precisely target the information that is most helpful to the Government. See Melissa Maleske, *Conducting Internal Investigations: 8 Important Steps*, Law.com (Aug. 1, 2011), https://perma.cc/6RN3-AEYU. And companies have other tools to contain investigative costs. See, *e.g.*, Virginia A. Davidson & Fritz E. Berckmueller, *Running the Internal Investigation: Lessons from General Motors*, Bloomberg Law (Oct. 2, 2014), https://perma.cc/RCS9-EVZG.

If companies still want to boil the ocean, they may do so—if they are willing to finance the boilers. But as the MVRA's text reflects, those costs should not be shifted to criminal defendants, especially on pain of imprisonment and without regard to their ability to pay.

## II. Unaffordable restitution awards harm victims, waste money, and diminish respect for the courts.

The barriers to rehabilitation and risks of recidivism caused by increased criminal debt are compounded by other harms—to victims, the justice system, and the public at large. The MVRA would not efficiently or effectively compensate victims for multimillion-dollar expenses like internal investigations.

Attempts to expand the MVRA must confront the unpaid elephant in the room: Most federal restitution debt is uncollected and uncollectible. In just over the first decade after Congress enacted the MVRA, federal criminal debt grew from $6 billion to over $50 billion; 80 percent of that debt was uncollected restitution. See Dickman, *supra*, at 1691–1692. Still, the size and proportion of unpaid debt continues to grow. According to the Government Accountability Office, by the end of fiscal year 2016, $110 billion in restitution was outstanding and $100 billion was "uncollectible" because "many offenders have little ability to pay the debt." U.S. Gov. Accountability Office, GAO-18-203, *Federal Criminal Restitution: Collections Could Be Improved* 25–26 (Feb. 2018), https://perma.cc/N9G2-C78Q.

Even defendants with earning power are less likely to work again if virtually all of their earnings will go to pay restitution awards indefinitely. In particular, defendants are less likely to make payments if they believe that their "best efforts at compensation will be inadequate." Stewart Macauley & Elaine Walster, *Legal Structures and Restoring Equity*, J. Soc. Issues 173, 178 (1971); see also Harris, *supra*, at 1780 ("The fact that legal debt often grew despite regular payments led some to feel so frustrated that they eventually stopped paying."). Case studies have likewise highlighted this dynamic in the similar context of criminal fines. See Beth A. Colgan, *Graduating*

*Economic Sanctions According to Ability to Pay*, 103 Iowa L. Rev. 53, 67–68 (2017). Ultimately, it is difficult to maintain the Sisyphean motivation to continue working and paying with no end in sight.

Meanwhile, imposing and enforcing restitution awards—and especially unpaid restitution awards—is itself expensive: "Each restitution order imposed by the courts increases administrative expenditures by approximately $400 to $500." Dickman, *supra*, at 1708. That number rises to $2000 once litigation and enforcement costs are added. See *ibid.* And the more criminal debt that cannot be paid, the higher the costs associated with enforcement, collection, related court hearings, and more incarceration. See Colgan, *supra*, at 70–72. Sometimes, imprisoning defendants for failing to pay debts costs even more than the value of those debts. See Roopal Patel & Meghna Philip, Brennan Ctr. for Justice, *Criminal Justice Debt: A Toolkit for Action* 6 (2012), https://perma.cc/C9SL-GH6E.

Compared to awards that are smaller and more affordable, large, unpaid awards are also more likely to upset victims. A pre-MVRA study revealed that victim satisfaction corresponds mostly to the percentage of the restitution award received, rather than to the size of the underlying award. See Robert C. Davis et al., *Restitution: The Victim's Viewpoint*, 15 Just. Sys. J. 746, 753, 754 (1992). Because the MVRA makes large and unpayable restitution awards the norm, however, "many victims end up feeling more disempowered and disillusioned with the criminal justice system than they would if they were given a realistic sense of how restitution works in practice." Lollar, *supra*, at 127. This leads to the dual harms of frustrated victims and disrespect for the justice system.

Restitution is especially ill-suited to cover large expenses because the restitution process is driven by the Government, not victims. It is the probation officer—not the victim—who presents to the court "a complete accounting of the losses to each victim." 18 U.S.C. 3664(a). If the probation officer requests it, it is the prosecutor, after consulting "to the extent practicable" with the victim, who provides the probation officer with the amounts subject to restitution. 18 U.S.C. 3664(d)(1). Although the victim has an opportunity to offer more information and an affidavit to the probation officer, 18 U.S.C. 3664(d)(2)(A), it is ultimately "the attorney for the Government"—not the victim—responsible for establishing the amount of the victim's losses, see 18 U.S.C. 3664(e).

Most notably, "[v]ictims are not promised that they can offer evidence, except by affidavit, or informed how to disagree with the restitution amount suggested by the probation officer or with the amount set forth in a plea agreement to which they are not a party." William M. Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After* Southern Union *v.* United States*?*, 64 Ala. L. Rev. 803, 813–814 (2013). Indeed, victims do not become parties to the criminal proceeding and may not appeal restitution awards that they think are too small. See *United States* v. *Kovall*, 857 F.3d 1060, 1063 (9th Cir. 2017) (joining "the First, Third, Fifth, Eighth, and Tenth Circuits in holding that a victim may not directly appeal the restitution component of a criminal defendant's sentence under the Mandatory Victims Restitution Act"). A recipe for satisfied victims this is not. Cf. Davis, *supra*, at 755 (pre-MVRA study "found that victims often had little involvement in decisions about the size of awards, received little information

about the collection process, and were largely dissatisfied with various aspects of their restitution experiences").

If, on the other hand, a victim wishes to pursue compensation for significant expenses caused by the defendant's conduct, and if she believes that the defendant would be able to pay such a judgment, then she can file a civil suit against that defendant. In a civil case, the victim—not the Government—would drive the train: The victim would decide how much money to demand, what evidence to present, whether to appeal an adverse decision, and how many resources to devote to enforcing a judgment. Defendants, for their parts, would receive procedural protections unavailable at criminal sentencing, "including the right to a jury, the right to call and cross-examine witnesses, and the protection provided by the rules of evidence." Slavin & Sorin, *supra*, at 535 (footnotes omitted). This process would be fairer to both sides, and more likely to leave victims satisfied by the result and confident in the justice system. And victims would pursue such civil awards only when it would make sense to do so—that is, when a defendant could actually afford to pay a large judgment.

In sum, respecting the MVRA's textual limits would promote defendant rehabilitation, victim satisfaction, and respect for the justice system writ large. Automatically charging criminal defendants for multimillion-dollar internal investigations, no matter what their ability to pay, would not.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 16-1519

# In the Supreme Court of the United States

SERGIO FERNANDO LAGOS,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER


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## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTEREST OF AMICUS CURIAE ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 4

Section 3663A(b)(4) does not authorize restitution of the victim's attorneys' fees. ..... 4

A. The statutory phrase "child care, transportation, and other expenses" does not encompass attorneys' fees, which are completely different in nature and magnitude from expenses for child care and transportation. ..... 5

B. The word "expenses," without any reference to attorneys' fees, does not encompass attorneys' fees. ..... 9

CONCLUSION ..... 14

## TABLE OF AUTHORITIES

CASES

*Arlington Central School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) ..... 10
*Baker Botts L.L.P. v. Asarco LLC*, 135 S. Ct. 2158 (2015) ..... 9
*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) ..... 6
*CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277 (2011) ..... 6
*Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) ..... 5
*Key Tronic Corp. v. United States*, 511 U.S. 809 (1994) ..... 9
*Law v. Siegel*, 134 S. Ct. 1188 (2014) ..... 10
*Marek v. Chesny*, 473 U.S. 1 (1985) ..... 10
*Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) ..... 10
*Summit Valley Indus., Inc. v. Local 112, United Brotherhood of Carpenters and Joiners*, 456 U.S. 717 (1982) ..... 10
*United States v. Amato*, 540 F.3d 153 (2d Cir. 2008) ..... 2
*United States v. Deer*, 2011 WL 2532462 (S.D. Miss. 2011) ..... 2
*United States v. Edwards*, 19 F. Supp. 3d 366 (D. Mass. 2014) ..... 2
*United States v. Elson*, 577 F.3d 713 (6th Cir. 2009) ..... 2
*United States v. Gamble*, 2007 WL 1114223 (D. Or. 2007) ..... 2

*United States v. Gupta*, 925 F. Supp. 2d 581 (S.D.N.Y. 2013), *aff'd*, 747 F.3d 111 (2d Cir. 2014) ..... 2
*United States v. Nisbet*, 2016 WL 7670849 (D. Mont. 2016) ..... 2
*United States v. Okun*, 2009 WL 2365979 (E.D. Va. 2009) ..... 2
*United States v. Skowron*, 529 F. App'x 71 (2d Cir. 2013) ..... 2
*Washington Dep't of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371 (2003) ..... 6
*Yates v. United States*, 135 S. Ct. 1074 (2015) ..... 6

STATUTES

2 U.S.C. § 396 ..... 12
5 U.S.C. § 504(a)(1) ..... 12
7 U.S.C.
§ 210(f) ..... 11
§ 499g(b) ..... 11
12 U.S.C.
§ 2273 ..... 12
§ 4246 ..... 12
§ 4588(d) ..... 12
§ 5005(b)(1) ..... 12
15 U.S.C.
§ 15(a) ..... 11
§ 1117(a) ..... 11
17 U.S.C. § 505 ..... 11
18 U.S.C.
§ 1964(c) ..... 11
§ 2248(b)(3)(E) ..... 10
§ 2255(a) ..... 11
§ 2259(b)(3)(E) ..... 10

18 U.S.C.
§ 2264(b)(3)(E) ..... 10
§ 2333(a) ..... 11
§ 3663A(b)(1) ..... 8
§ 3663A(b)(2)(A) ..... 8
§ 3663A(b)(2)(B) ..... 8
§ 3663A(b)(2)(C) ..... 8
§ 3663A(b)(3) ..... 8
§ 3663A(b)(4) ..... passim
28 U.S.C.
§ 361 ..... 12
§ 1447(c) ..... 12
§ 1875(d)(2) ..... 12
§ 1927 ..... 12
§ 2412(b) ..... 11
29 U.S.C.
§ 107 ..... 12
§ 216(b) ..... 12
§ 1370(e)(1) ..... 12
30 U.S.C. § 938(c) ..... 13
31 U.S.C. § 3730(d)(1) ..... 13
33 U.S.C. § 928(a) ..... 12
35 U.S.C. § 285 ..... 12
38 U.S.C. § 4323(h)(2) ..... 13
42 U.S.C.
§ 1988(b) ..... 12
§ 2000a-3(b) ..... 12
§ 3613(c)(2) ..... 12
§ 4654(a) ..... 13
47 U.S.C. § 206 ..... 12
52 U.S.C. § 10310(e) ..... 13
54 U.S.C. § 307105 ..... 12

OTHER AUTHORITY

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) ..... 6

## INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and with its affiliates represents more than 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the just, proper, and efficient administration of justice. It frequently appears as an amicus curiae before this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal defense system as a whole.[1]

## INTRODUCTION AND SUMMARY OF ARGUMENT

Lurking in this case is an important question: whether 18 U.S.C. § 3663A(b)(4) authorizes restitution of the victim's attorneys' fees. The victim's attorneys' fees are usually a large component of the cost of an internal investigation, as in this case. But

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made a monetary contribution to its preparation or submission. Petitioner has filed a blanket consent to amicus briefs. Respondent has consented to the filing of this brief.

this issue also arises in many contexts other than internal investigations. In recent years, for example, the government has sought restitution under section 3663A(b)(4) for:

- Attorneys' fees incurred by victims in bringing civil suits against the defendant or a person associated with him. *United States v. Elson*, 577 F.3d 713, 727-28 (6th Cir. 2009); *United States v. Edwards*, 19 F. Supp. 3d 366, 373-75 (D. Mass. 2014); *United States v. Nisbet*, 2016 WL 7670849, *2-3 (D. Mont. 2016).

- Attorneys' fees incurred by victims in parallel civil proceedings. *United States v. Skowron*, 529 F. App'x 71, 74-75 (2d Cir. 2013); *United States v. Gupta*, 925 F. Supp. 2d 581, 586 (S.D.N.Y. 2013), *aff'd*, 747 F.3d 111 (2d Cir. 2014).

- Attorneys' fees incurred by victims to "clean up their security." *United States v. Deer*, 2011 WL 2532462, *4 (S.D. Miss. 2011).

- Attorneys' fees incurred by victims for "dealing with the consequences" of the defendant's fraud. *United States v. Okun*, 2009 WL 2365979, *2 (E.D. Va. 2009).

- Attorneys' fees incurred by a victim to "straighten out his finances." *United States v. Gamble*, 2007 WL 1114223, *6 (D. Or. 2007).

Some of these awards of attorneys' fees have been enormous. For instance, in *Gupta*, 925 F. Supp. 2d at 588, the court ordered restitution of $6.2 million in attorneys' fees. *See also Skowron*, 529 F. App'x at 73 (awarding restitution of $3.8 million of the victim's attorneys' fees and costs); *United States v. Amato*, 540 F.3d 153, 158 (2d Cir. 2008) (awarding restitu-

tion of over $3 million of the victim's "attorney fees and accounting costs").

In all these cases, when seeking restitution of the victim's attorneys' fees under section 3663A(b)(4), the government has necessarily relied on the statute's "other expenses" clause. The statute authorizes restitution of "**lost income** and necessary **child care**, **transportation**, and **other expenses** incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A(b)(4) (emphases added). Attorneys' fees are obviously not "lost income" or expenses for "child care" or "transportation." All that remains in section 3663A(b)(4) is the clause authorizing restitution for "other expenses."

But the "other expenses" clause does not authorize restitution of the victim's attorneys' fees, for two independent reasons.

First, attorneys' fees are nothing at all like child care expenses or transportation expenses. Call it *ejusdem generis* or call it common sense—the statute plainly contemplates that the "other expenses" will be expenses similar to outlays for child care or transportation. These are moderate costs that a victim might incur while leaving home to help with the investigation or prosecution or to testify at trial. A multi-million dollar attorneys' fee bill is completely different in nature and in size.

Second, even if we put aside the references to child care and transportation, the word "expenses" does not include attorneys' fees. When Congress wants to make one person pay another person's at-

torneys' fees, Congress is explicit about it. Indeed, there are other restitution statutes that specifically authorize restitution of the victim's attorneys' fees. The Court has consistently held that statutory authorizations to make one person pay another's "costs" or "compensation" do not encompass attorneys' fees, unless the statute specifically mentions attorneys' fees.

In this case, the disputed restitution award included approximately $2.5 million in attorneys' fees incurred by the victim. This portion of the award, at least, was not authorized by section 3663A(b)(4).[2]

## ARGUMENT

### Section 3663A(b)(4) does not authorize restitution of the victim's attorneys' fees.

Section 3663A(b)(4) does not authorize restitution of the victim's attorneys' fees, for two independent reasons. First, attorneys' fees are not encompassed within the statutory phrase "other expenses," because they are completely different in nature and in magnitude from the specific listed expenses for child care and transportation. Second, the word "expens-

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[2] This issue is squarely within both parties' wording of the Question Presented. The government's Question Presented is "[w]hether the district court erred in ordering restitution for internal investigation expenses and attorney's fees that were caused by petitioner's fraud offenses." BIO I. Our answer: Yes, at least as to the attorneys' fees. The petitioner's Question Presented is "[w]hether Section 3663(b)(4) covers costs that were 'neither required nor requested' by the government, including costs incurred for the victim's own purposes and unprompted by any official government action." Pet. I. Our answer: No, at least as to the attorneys' fees.

es" does not encompass attorneys' fees, where Congress does not specifically refer to attorneys' fees.

### A. The statutory phrase "child care, transportation, and other expenses" does not encompass attorneys' fees, which are completely different in nature and magnitude from expenses for child care and transportation.

Section 3663A(b)(4) authorizes restitution of "child care, transportation, and other expenses." This phrase does not encompass the victim's attorneys' fees, which are nothing like expenses for child care or transportation, either in nature or in magnitude.

When a store advertises "baseballs, footballs, and *other balls*," shoppers know they will not find matzo balls or balls of yarn, despite the phrase "other balls," because they realize that the other balls at the store will be similar to baseballs and footballs. In ordinary speech, everyone understands that "other items" at the end of a list of specific items means other items like the ones in the list. Otherwise there would have been no point in listing specific items.

This common-sense principle, as applied to statutes, is the *ejusdem generis* canon of construction. Under this canon, "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Thus where a statute exempts "seamen, railroad employees, or any other class of workers," the "other class of

workers" includes only workers similar to seamen and railroad employees. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). Likewise, where a statute applies to "execution, levy, attachment, garnishment, or other legal process," the "'other legal process' should be understood to be process much like the processes of execution, levy, attachment, and garnishment." *Washington Dep't of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 385 (2003).

One purpose of the *ejusdem generis* canon is to give effect to the intent of Congress. "When the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012).

A second purpose of the *ejusdem generis* canon is to avoid rendering meaningless the specific examples in the statutory text. *Yates v. United States*, 135 S. Ct. 1074, 1086-87 (2015) (plurality opinion); *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 295 (2011). Where Congress enacts a statute with a sentence in the form "A, B, and other X's," the "other X's" cannot mean *all* other X's without turning "A" and "B" into surplusage. A and B *are* X's, so if Congress had meant *all* other X's, it would have just said "X's" without mentioning A and B. Where a statute says "A, B, and other X's," the other X's thus have to be X's similar to A and B.

Section 3663A(b)(4) authorizes restitution of "child care, transportation, and other expenses." The "other expenses" must be similar in nature to expenses for child care and transportation. That is,

they must be moderate expenses that a person might incur while leaving home to aid the prosecution in investigating and prosecuting the offense.

It is not hard to think of examples:

• The cost of lodging and meals, where the trial is not in the victim's home town. A securities fraud prosecuted in New York, for example, might have victims all over the country. Several federal districts, such as the Districts of Alaska and Nevada, are so large that some victims must travel long distances to testify.

• The cost of caring for a family member who is not a child. Many people are the primary caregivers for a parent, a grandparent, or a disabled relative who cannot be left alone for an extended period of time. While a victim is away from home, he or she may need to hire a professional caregiver.

• The cost of long-distance phone calls. This is less of a concern now, but in 1996, when the statute was enacted, a victim who lived far from the prosecutor's office could run up a substantial phone bill.

These are "other expenses" that are of the same nature and order of magnitude as the specific examples of expenses mentioned in the statute. They are the kind of moderate expenses that any victim might incur while helping the government prepare for trial or while testifying at trial.

Attorneys' fees are nothing at all like expenses for child care and transportation, either in nature or in magnitude. The two categories of expenditure have completely different purposes. Child care and transportation expenses are incidental costs of leaving home to attend trial or to help with the investiga-

tion. Hiring a lawyer, by contrast, is not an incidental cost of leaving home to attend trial or to help the prosecutor. It is a deliberate choice, normally made for one's own benefit rather than to aid the prosecution.

Moreover, expenses for child care and transportation are inherently modest in amount. Attorneys' fees, by contrast, can (as in this case) run into the millions. They are limited only by the number of hours a law firm can bill and the hourly rate the law firm can charge.

The conclusion that attorneys' fees are not encompassed in section 3663A(b)(4)'s reference to "other expenses" is reinforced by the fact that the large-value items of restitution authorized by section 3663A are not in subsection (b)(4). They are in other subsections. These large-value items include the return of lost or damaged property (or compensation, if return is impractical), § 3663A(b)(1); payment for the cost of medical treatment, § 3663A(b)(2)(A), and physical therapy and rehabilitation, § 3663A(b)(2)(B); reimbursement for lost income arising from bodily injury, § 3663A(b)(2)(C); and the cost of funeral and related services, § 3663A(b)(3). It is hardly plausible that Congress would sneak attorneys' fees, which are often much larger than any of these listed items of restitution, into the phrase "child care, transportation, and other expenses."

The statutory phrase "child care, transportation, and other expenses" thus does not include the victim's attorneys' fees. Applying the *ejusdem generis* canon or applying simple common sense, the phrase "other expenses" does not contemplate attorneys'

fees, because attorneys' fees are completely different from child care and transportation expenses.[3]

### B. The word "expenses," without any reference to attorneys' fees, does not encompass attorneys' fees.

Section 3663A(b)(4) authorizes restitution of certain of the victim's "expenses." The statute does not refer specifically to attorneys' fees. For this reason, even in the absence of *ejusdem generis*, section 3663A(b)(4) would not authorize restitution of the victim's attorneys' fees.

Because the background rule is that each person pays his or her own attorneys' fees, the Court has held several times that Congress's use of a broad term such as "compensation," "costs," or "expenses," without an express reference to attorneys' fees, does not encompass attorneys' fees. Thus in *Baker Botts L.L.P. v. Asarco LLC*, 135 S. Ct. 2158, 2162, 2164 (2015), the Court held that a statute authorizing the award of "compensation" for "necessary services" does not authorize the award of attorneys' fees. Likewise, in *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-19 (1994), the Court held that a statute authorizing the award of "necessary costs" does not authorize the award of attorneys' fees. Such "generalized commands," the Court concluded, are not sufficient, without a specific reference to attorneys' fees. *Id.* at 815 (citation omitted). *See also*

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[3] Although our brief focuses on attorneys' fees, the argument in section A applies equally to other professional fees, such as fees for accountants and consultants. These professional fees, like attorneys' fees, are nothing like child care and transportation expenses in nature or magnitude.

*Summit Valley Indus., Inc. v. Local 112, United Brotherhood of Carpenters and Joiners*, 456 U.S. 717, 722 (1982) ("Ordinarily a statutory right to 'damages' does not include an implicit authorization to award attorney's fees."); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980) (statute authorizing "costs" does not authorize attorneys' fees).

By contrast, for a general term like "expenses" or "costs" to encompass attorneys' fees, the statute must explicitly include attorneys' fees in the definition of that general term. *See, e.g.*, *Law v. Siegel*, 134 S. Ct. 1188, 1195 (2014) (interpreting Bankruptcy Code provisions which specifically define "administrative expense" to include attorneys' fees); *Arlington Central School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006) (interpreting the IDEA, which authorizes the court to "award reasonable attorneys' fees as part of the costs"); *Marek v. Chesny*, 473 U.S. 1, 8-9 (1985) (noting that the term "costs" includes attorneys' fees only where Congress has expressly so provided).

Section 3663A(b)(4)'s failure to mention attorneys' fees is particularly telling, because other restitution statutes *do* specifically authorize restitution of the victim's attorneys' fees. For instance, under the restitution statute applicable to sexual abuse offenses, the court is expressly authorized to include the victim's "attorneys' fees" in the restitution award. 18 U.S.C. § 2248(b)(3)(E). Congress also specifically authorized restitution of the victim's attorneys' fees in the statute applicable to offenses involving the sexual exploitation of children, *id.* § 2259(b)(3)(E), and in the statute applicable to offenses involving domestic violence and stalking, *id.* § 2264(b)(3)(E). Congress

included no such provision in section 3663A(b)(4). When Congress wants to make the defendant pay the victim's attorneys' fees as part of the restitution, Congress says so specifically. Congress does not hide the attorneys' fees in a general phrase like "other expenses."

There are also several provisions of Title 18 that—unlike section 3663A(b)(4)—expressly require the defendant to pay the victim's attorneys' fees where the victim brings a civil suit against the defendant to recover for injuries arising from the offense. *See* 18 U.S.C. § 1964(c) (requiring the defendant to pay the victim's attorneys' fees in civil suits arising from RICO violations); *id.* § 2255(a) (requiring the defendant to pay the victim's attorneys' fees in civil suits arising from offenses involving the sexual exploitation of children); *id.* § 2333(a) (requiring the defendant to pay the victim's attorneys' fees in civil suits arising from offenses involving terrorism). Congress included no such requirement in section 3663A(b)(4). Again, when Congress wants the defendant to pay the victim's attorneys' fees, Congress refers specifically to attorneys' fees, not generally to "expenses."

Indeed, in all contexts—not just criminal cases—where Congress wants one person to pay another's attorneys' fees, Congress says so explicitly. *See, e.g.*, 7 U.S.C. § 210(f) ("If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee."); *id.* § 499g(b) (same); 15 U.S.C. § 15(a) (allowing the plaintiff to recover "a reasonable attorney's fee"); *id.* § 1117(a) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party."); 17 U.S.C. § 505 ("the court may also award a reasonable attorney's fee to the prevailing party"); 28

U.S.C. § 2412(b) ("a court may award reasonable fees and expenses of attorneys"); 29 U.S.C. § 107 (authorizing the award of "a reasonable attorney's fee"); *id.* § 216(b) (same); 33 U.S.C. § 928(a) (same); 35 U.S.C. § 285 ("The court in exceptional cases may award reasonable attorney fees to the prevailing party."); 42 U.S.C. § 1988(b) (authorizing the award of "a reasonable attorney's fee"); *id.* § 2000a-3(b) (same); *id.* § 3613(c)(2) (same); 47 U.S.C. § 206 (authorizing the award of "a reasonable counsel or attorney's fee"); 54 U.S.C. § 307105 ("the court may award attorney's fees").

Where Congress wants one person to pay another's expenses *and* attorneys' fees, Congress explicitly refers to both. Congress does *not* assume or intend that the word "expenses," by itself, includes attorneys' fees. *See, e.g.*, 2 U.S.C. § 396 (authorizing award of "reasonable expenses ... including reasonable attorneys fees"); 5 U.S.C. § 504(a)(1) (authorizing award of "fees and other expenses"); 12 U.S.C. § 2273 (authorizing award of "reasonable expenses and attorneys' fees"); *id.* § 4246 (authorizing award of "reasonable attorney's fees and other expenses of litigation"); *id.* § 4588(d) (authorizing award of "reasonable expenses and attorneys fees"); *id.* § 5005(b)(1) (authorizing award of "reasonable attorney's fees and other expenses"); 28 U.S.C. § 361 (authorizing award of "reasonable expenses, including attorneys' fees"); *id.* § 1447(c) (authorizing award of "actual expenses, including attorney fees"); *id.* § 1875(d)(2) (authorizing award of "attorney fees and expenses"); *id.* § 1927 (authorizing award of "costs, expenses, and attorneys' fees"); 29 U.S.C. § 1370(e)(1) (authorizing award of "costs and expenses ... including rea-

sonable attorney's fees"); 30 U.S.C. § 938(c) (authorizing award of "all costs and expenses (including the attorney's fees)"); 31 U.S.C. § 3730(d)(1) (authorizing the award of "expenses ... plus reasonable attorneys' fees and costs"); 38 U.S.C. § 4323(h)(2) (authorizing the award of "reasonable attorney fees, expert witness fees, and other litigation expenses"); 42 U.S.C. § 4654(a) (authorizing the award of "expenses, including reasonable attorney, appraisal, and engineering fees"); 52 U.S.C. § 10310(e) (authorizing the award of "a reasonable attorney's fee ... and other reasonable litigation expenses").

If the word "expenses," by itself, were enough to authorize the award of attorneys' fees, the specific mention of attorneys' fees in all these statutes would be redundant.

Unlike all these statutes, section 3663A(b)(4) refers only to "expenses," not to attorneys' fees. It therefore does not authorize the restitution of the victim's attorneys' fees. Congress knows how to make one person pay another's attorneys' fees, but Congress did not include such a provision in section 3663A(b)(4).

## CONCLUSION

The judgment below should be reversed, at least to the extent it includes the victim's attorneys' fees and similar professional fees.

Respectfully submitted,

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